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Society-**

22 September 1912-

HINE & NICHOLS'
NEW DIGEST
OF
INSURANCE DECISIONS
FIRE AND MARINE,
TOGETHER WITH AN
ABSTRACT OF THE LAW

ON EACH IMPORTANT POINT IN FIRE AND MARINE INSURANCE. THE
WHOLE BEING INTENDED AS A COMPLETE HAND-BOOK OF THE LAW,
AS ESTABLISHED BY THE MOST RECENT ADJUDICATIONS IN THE
COURTS OF THIS COUNTRY AND GREAT BRITAIN.

BY

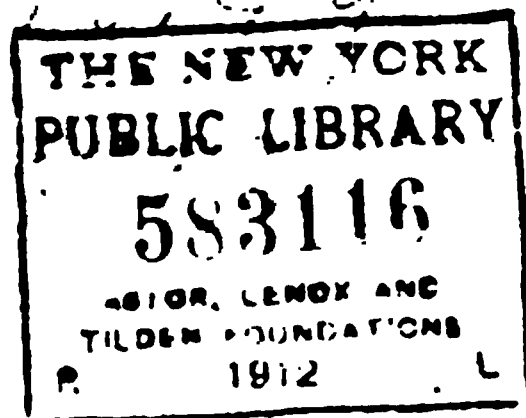
C. C. HINE and WALTER S. NICHOLS,

EDITORS, INSURANCE LAW JOURNAL.

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1882.



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INTRODUCTION.

The aim of the present work is to furnish a complete summary of the law relative to Fire and Marine insurance, as modified and extended by the latest judicial decisions down to 1881, in so far as that object can be accomplished within the compass of a single volume. During the last six or seven years, and since the latest insurance digests and text-books have been published, upwards of one thousand fire and marine cases have been decided in the higher courts of this country and England, embracing nearly every prominent question connected with this business, together with many important issues not heretofore raised. Full digests of these cases are presented in the following pages, together with the citation of several thousand previous decisions in which similar points were adjudicated, and which were quoted by the courts in support of the doctrines enunciated. To give completeness to the work as a book of reference, a brief abstract of the law on each topic, with a selection of standard cases in support, precedes the regular digest of recent cases. Nearly two hundred topics, alphabetically arranged, will be found thus separately treated. To further facilitate reference to any subject, a copious topical index is added at the end of the book, by means of which subjects which are treated under several captions can be found.

The value of a digest as an embodiment of the law, largely depends on the special facts and circumstances which control the decision and serve to distinguish it from apparently inconsistent rulings in other cases. The editors have, therefore, aimed to give prominence to these facts, and to treat each important case in its connections as an entirety; to present, as far as practicable, the case itself in miniature, rather than a mere brief and disconnected statement of the ruling, which usually requires a further reference to the decision to ascertain the principles involved.

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In addition to cases in appellate courts of last resort, a large number of recent decisions in various lower courts, most of which have been final, will be found; also instructions and rulings, frequently verbal, in *nisi prius* trials, which will not appear in the State reports. The name of the court has been given in every instance, and usually that of the State report, if published. For the convenience and at the request of underwriters and insurance lawyers, the Insurance Law Journal, in which a majority of the decisions have been published, is also referred to. In numerous instances the official digests of the State reporters have been substantially adopted, where they contained a satisfactory embodiment of the questions at issue. The editors also desire to recognize their indebtedness to the various legal periodicals of the country for many of the digests which have been incorporated in this work.

The long experience of the editors in the various departments of insurance, and especially of insurance law, has been utilized in an effort to thus present a compend of the best law on those points likely to be of the most practical importance to the profession, and to classify the decisions under captions most likely to suggest themselves to the underwriter or insurance lawyer. In furtherance of these ends, nearly all the leading authorities have been freely consulted.

With few exceptions, none of the digested cases are as yet to be found in any published work on insurance, except the Insurance Law Journal. The present work is, therefore, at once a supplement to all that has gone before, and an epitome of the more important doctrines of the law of fire and marine insurance as a whole.

C. C. HINE.
WALTER S. NICHOLS.

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Hine & Nichols' Digest.

ABANDONMENT.

ABSTRACT OF THE LAW.

NOTE.—Abandonment is peculiar to marine insurance, the principles involved not often appearing in the litigation of fire insurance cases.

a. An abandonment is generally necessary in order to recover the whole, amount insured as for a total loss, unless there be an absolute destruction of value in the subject of insurance, or it is lost beyond hope of recovery.

2 Arnould on Ins., 1007; *Smith vs. Manhattan Ins. Co.*, 7 Met., 453; *Watson vs. Ins. Co. of N. A.*, 1 Binn., 54; *Sewell vs. Ins. Co.*, 11 Pick., 90; *Thomas vs. Rockland Ins. Co.*, 45 Me., 116.

b. Formal abandonment is required in case of the necessary sale of the damaged subject of insurance by the master on his own responsibility in a foreign port, the proceeds of sale being regarded as salvage.

Grainger vs. Martin, 2 Best & S. 456; *Knight vs. Faith*, 15 Adol. & E., N. S., 658.

c. No particular form of abandonment is necessary; it may be oral or written but must clearly state the facts and reasons.

Patapsco Ins. Co. vs. Southgate, 5 Pet., 604.

d. The insured may elect to abandon or claim for a partial loss.

Smith vs. Manf. Ins. Co., 7 Met., 448; *Gracie vs. Ins. Co.*, 8 Johns., 237.

e. To justify an abandonment according to the English rule, the damage must be too great to justify repairs; or according to the American rule, exceed half the value.

Grainger vs. Martin, 4 Best & Smith, 9; *Benson vs. Chapman*, 6 Man. & G., 810; *Gordon vs. Ins. Co.*, 2 Pick., 249; *Smith vs. Ins. Co.*, 7 Metcalf, 448.

f. When insurance is only against "total loss," or "free from average," etc., the authorities are in conflict as to the right to abandon.

Williams vs. Kennebec Ins. Co., 31 Me., 455; *Hugg vs. Augusta Ins. Co.*, 7 How., 595; *Kettell vs. Alliance Ins. Co.*, 10 Gray, 144.

g. Where the insurance is on the whole in a single sum, there can generally be no abandonment of part, but otherwise when the valuations are separate.

Humphreys vs. Ins. Co., 3 Mason, 429; *Deldericks vs. Ins. Co.*, 10 Johns., 234.

h. A subsequent incumbrance prevents an abandonment.

Gordon vs. Mass. F. & M. Ins. Co., 2 Pick., 249; *Allen vs. Comm. Ins. Co.*, 1 Gray, 154.

i. Whether an abandonment is allowable on account of damages, when the voyage has been completed, the authorities are conflicting.

Pensant vs. Ins. Co., 15 Wend., 458; *Peters vs. Ins. Co.*, 3 S. & R., 25.

j. Whether "one-third new for old" must be first deducted in computing the 50 per cent, whether the premium should be included, and whether the actual or policy value is to be taken, are disputed.

Penzant vs. Ins. Co., supra; *Peele vs. Ins. Co.*, 3 Mason, 27; *Center vs. Amer. Ins. Co.*, 7 Cow., 561; *Hall vs. Ocean Ins. Co.*, 21 Pick., 472; *Orrok vs. Ins. Co.*, 21 Pick., 456; *Brooks vs. Ins. Co.*, 7 Pick., 259.

k. Cost of repairs is to be estimated at the place or places where they were or should be made. Wages of crew are not included in the loss, but salvage and cost of raising are included.

Center vs. Ins. Co., 7 Cow., 564; *Orrok vs. Ins. Co.*, supra; *Hall vs. Ins. Co.*, 21 Pick., 472; *Bradlie vs. Ins. Co.*, 12 Pet., 378.

l. Whether an abandonment may be waived by an election to repair by the insurers is disputed.

Peele vs. Merch. Ins. Co., 3 Mason, 27; *Ritchie vs. Ins. Co.*, 5 S. & R., 501.

m. A sale by the master to be justifiable must be stringently necessary under the circumstances, in good faith and with good judgment.

Robinson vs. Ins. Co., 17 Me., 181; *Prince vs. Ins. Co.*, 40 Me., 481; *Stephenson vs. Ins. Co.*, 7 Allen, 232.

n. When goods can be profitably forwarded to their port of destination, a failure by the master to do so will generally defeat an abandonment.

Portland Bank vs. Stubbs, 6 Mass., 422.

o. Jettison is ground for abandonment when the claim for contribution is also transferred.

Lord vs. Neptune Ins. Co., 10 Gray, 109.

p. The fifty per cent. rule applies also to freight, but new freight carried on the same voyage is to be accounted for as salvage.

Green vs. Roy. Ex. Ass. Co., 6 Taunt., 69; *Amer. Ins. Co. vs. Center*, 4 Wend., 45.

q. The abandonment must be made within a reasonable time.

Thwing vs. Wash. Ins. Co., 10 Gray, 443; *Smith vs. Ins. Co.*, 4 Mass., 668.

r. The acceptance of an abandonment binds the insurer, and is irrevocable as to the insured.

Smith vs. Robertson, 2 Dow, 474.

s. An abandonment is valid if justified by the circumstances, though the damage afterwards proves to be slight.

Humphreys vs. Union Ins. Co., 3 Mason, 429; *Rhinelanders vs. Ins. Co. of Pa.*, 4 Cranch, 29.

t. An abandonment carries with it all claims and interests connected with the subject of insurance so far as the policy covers.

Cincinnati Ins. Co. vs. Bakewell, 4 B. Mon., 541; *Rice vs. Cobb*, 9 Cush., 302.

See further on this subject, under GENERAL AVERAGE, LOSS, MASTER, PARTICULAR AVERAGE.

DIGEST OF RECENT CASES.

ABANDONMENT—WHEN NECESSARY OR JUSTIFIABLE.

1. The right to recover for a constructive total loss, on abandonment of a vessel to the underwriters, depends upon the state of facts when the abandonment is made, and the abandonment, if justified by those facts, relates back to the time of the loss.

If a vessel is once totally lost by a peril insured against, and the master, using due diligence, is unable to regain possession of her in such a condition and under such circumstances as to enable her to pursue the voyage for which she is insured, the right to abandon and to recover for a constructive total loss remains, without regard to the question whether at some future time, over which the master has no control, he might be able to regain possession of her on payment of salvage, and without regard to the proportion between the amount of the salvage and the value of the vessel.

Snow vs. Union Ins. Co., Mass. S. J. C., 119 Mass., 592.

2. No abandonment is necessary when there is an actual total loss.

Roux vs. Salvador, 3 Bing., N. C., 266.

Where a vessel, after encountering a sea peril, is justifiably sold, the insured may claim a total loss, accounting to the insurer for the proceeds of the sale as salvage received for his benefit.

Idle vs. Royal Ex. Ins. Co., 8 Taunt., 755; Cambridge vs. Atherton, 2 R. & Mood., 60; Ib., 2 B. & C., 691; Roux vs. Salvador, supra; Dyson vs. Rowcroft, 3 Bos. & Pul., 474; Gordon vs. Mass. F. and M. Ins. Co., 2 Pick., 249; American Ins. Co. vs. Center, 4 Wend., 45; 2 Pars. on Ins., 86; Arnould on Ins., 850; Phillips on Ins., sec. 1497.

The vessel was torn from the dock by a gale and driven upon the rocks on a dangerous coast in a shattered condition, where there was strong probability that she would be compelled to remain during the winter and be ultimately destroyed. After a competent survey she was sold by the master. The purchasers succeeded in getting her off, repaired her, and sold her for less than the cost of repairs. *Held*, that the facts constituted an

urgent necessity which justified the sale, and an abandonment was unnecessary.

The Amelia, 6 Wall., 30; *Butler vs. Murray*, 30 N. Y., 88; *Robertson vs. Clarke*, 1 Bing., 445; *Robertson vs. Carruthers*, 2 Stark., 57; 2 Arnould on Ins., sec. 1091; 2 Parsons on Ins., 86.

McCall vs. Sun Mutual Ins. Co., N. Y. C. A., 66 N. Y., 505; 6 *Ins. Law Journal*, 56.

3. The vessel and cargo having been run ashore in a storm, was sold under the advice of the surveyor. The case was treated by insured as a constructive total loss, and no notice of abandonment was given. *Held*, that the loss must, in fact, have been total before the sale to excuse the notice. Where the evidence showed the survey to have been most cursory, that the vessel was in no imminent danger at the time of sale, and no effort was made to save her, which was subsequently accomplished; *Held*, that the absence of notice of abandonment was fatal to a claim against the insurers.

Leslie vs. Taylor, Nova Scotia S. C.

4. The owner is bound to immediately give notice of abandonment to the underwriter upon reliable information of the imminent peril of the thing insured, in order to recover for a constructive total loss, and his neglect will not be excused because afterwards the subject matter is justifiably sold.

Kalten Bach vs. Mackenzie, Eng. C. P., 3 C. P. D., 467.

WHAT IT INCLUDES.

5. P. insured a vessel for \$11,000, stated in the policies to be worth \$13,500. The policy provided that no abandonment should be valid unless sufficient to vest in the company "an unincumbered and perfect title to the subject abandoned, and the valuation of said vessel, expressed in this policy, shall be considered the value in adjusting losses covered by this policy." The vessel was lost, and P. abandoned to the companies "all right, title and interest possessed by me in said vessel, tackle and apparel under said policy." The vessel was afterward recovered by the underwriters and repaired. A libel against the vessel filed by the carpenters making the repairs, was contested by P.

on the ground that he had only abandoned 22-27ths of the vessel. *Held*, that P.'s insurable interest was the whole vessel, which was the subject of the policy, and not an undivided share; that entire interest was included in the abandonment. P. had no further interest in the vessel, and was not entitled to defend the suit.

Mills vs. Schooner Perew, U. S. C. C., N. Y., 8 Ins. Law Journal, 59.

6. The insurance was on freight. The vessel was wrecked about fifty miles from her destination, and proved a total loss. Two-thirds of the cargo was taken out by a wrecking company, transhipped, and delivered to the insurers on cargo, to whom it had been abandoned, and sold by them. *Held*, that though the ship, cargo, and freight belonged to the same owner, being separately insured it must be treated as the property of different owners. *Held*, that the reception of any part of the cargo by the insurers, to whom it had been abandoned, was equivalent to its reception by the owner so far as the earning of freight was concerned. The owner of cargo cannot disable the shipowner from earning freight by its abandonment. *Held*, that by so abandoning, he might lose his lien for freight if he took no means for securing it, and could not then resort to the insurers on freight. *Held*, that a verdict rendered in accordance with a charge contrary to these principles could only be sustained where the evidence of a total loss of freight was so clear as to entitle to a verdict by the court. *Held*, that a total loss of the vessel, short of her destination, involves only a constructive total loss of freight, and requires an abandonment of that interest unless the subsequent earning of freight was hopeless or impossible. *Held*, that where the shipowner neglects to abandon freight under circumstances justifying an abandonment, he must make all reasonable efforts to forward the cargo in order to claim for a total loss on freight, unless the cost of so doing would exceed the freight. *Held*, that the expenses of saving or caring for the goods, are chargeable on the cargo, and the cost of transportation alone must exceed the freight to excuse the owner. *Held*, that even where such combined expenses exceed the freight, they do not prevent freight from being earned, if the selling price of the goods at the port of destination

would be sufficient to cover all expenses. *Held*, that the master may earn freight if the goods are in charge of the owners or insurers, by offering to carry them, and if the latter refuse, they must pay full freight. If, after such an offer, the cargo is delivered up to the owners or abandonees at the point of destination by mutual consent, freight pro rata is earned. *Held*, that the burden is on the shipowner to show an inability to earn freight. A policy clause providing that no claim shall be made for a total loss on freight, unless there is a loss of more than half the freight, and an actual or technical loss of the vessel, does not waive the necessity for abandonment. *Held*, that in case of abandonment of the vessel the freight must be apportioned pro rata: that earned before the disaster belongs to the shipowner or his representative, the insurer, and the rest to the abandonee. The abandonment does not deprive the owner of his recourse against the insurer on freight. But it is only when the cargo is carried to its destination in the original vessel that a portion of the freight belongs to the abandonee. In case of a substituted vessel the owner may claim the whole. *Held*, that if the wrecking company acted as agent of the master, freight was earned; but if it acted voluntarily as a salvor, the freight must contribute to the salvage, though not completely earned, along with the other interests, and the shipowner is bound to interpose his claim in the interest of the freight for a proper adjustment of expenses on the cargo. *Held*, that if the owner failed to secure the interest of the freight through abandonment, his recourse must be against the insurer of the cargo, who has realized from a sale at an advanced price for a readjustment, and not against the insurer of freight.

Citing *Smyth vs. Wright*, 15 Barb., 51; 44 N. Y., 437; *Baldwin vs. Burrows*, 47 N. Y., 199; *Arn. on Ins.*, 4th ed., 909, 912, 913, 960, 963, 967, 968; *Center vs. Am. Ins. Co.*, 7 Cow., 583, S. C., 4 Wen., 46; *Whitney vs. N. Y. Firemen's Ins. Co.*, 18 Johns, 208, 3 Kent Com., 210, 213; *Shipton vs. Thornton*, 9 Ad. & El. 314, 334-5; *Kidston vs. Empire Ins. Co.*, 2 L. R., C. P., 357; *Hugg vs. Augusta Banking and Ins. Co.*, 7 How. (U. S.), 595; *Griswold vs. N. Y. Ins. Co.*, 3 Johns. id., 321; *Allen vs. Mercantile Mut. Ins. Co.*, 44 N. Y., 437; *Bradhurst vs. Col. Ins. Co.*, 9 Johns., 17; 2 Parsons Mar. Law, 158, 160, 372, 386; *Phillips on Insurance*, sec. 1632; *Roberston vs. Atlantic Mutual Ins. Co.*, 68 N. Y., 195; *Moody vs. Jones*, 4 Barn. & Cress., 394; *Heyliger vs. N. Y. Firemen's Ins. Co.*, 11 J. R., 85; 5 Johns. R., 262; 4 Johns. Ch., 219; *McCarthy vs. Abel*, 5 East., 389; 7 East, 24; *Scottish Mar. Ins. Co. vs. Turner*, 1 Macg. H. of L'ds. Cas., 334; *Davy vs. Hallett*, 3 Caines, 16; *Hickie vs. Rodonachi*, 28 L. J.

(Ex.,) 273; *Atlantic Ins. Co. vs. Bird*, 2 Bosw., 195; *The Peace*, 1 Swabey, 85.

Hubbell vs. Great Western Ins. Co., N. Y. C. A., 74 N. Y., 246; 8 *Ins. Law Jour.*, 146.

See Cross Index at end of volume, for other cases bearing on ABANDONMENT.

ACTION.

ABSTRACT OF THE LAW.

a. Assumpsit is the proper form of action upon policies unless under seal, when the action is that of deed or covenant.

Hughes vs. Ins. Co., 8 Wheat., 294; *Marine Ins. Co. vs. Young*, 1 Cranch, 332; *Franklin vs. Ins. Co.*, 25 N. J., 506; *Aurora Fire Ins. Co. vs. Eddy*, 55 Ill., 213; *Franklin F. Ins. Co. vs. Massy*, 33 Penn. St., 221.

b. The usual remedy is in equity in case of parol contracts, and of fraud or mistake.

Harris vs. Ins. Co., 18 Ohio, 116; *Taylor vs. Insurance Co.*, 9 Ohio (N. S.), 390; *Carpenter vs. Ins. Co.*, 4 Sanford (Ch.), 408; *Post vs. Ins. Co.*, 43 Barb. (N. Y.), 351; *Globe Mut. Ins. Co. vs. Reals*, 48 How. Pr., 502.

c. Suit must usually be brought in the name of the assured.

Blanchard vs. Ins. Co., 33 N. H., 9; *Conover vs. Insurance Co.*, 1 N. Y., 290; *Jessel vs. Ins. Co.*, 3 Hill (N. Y.), 88.

d. But suit should be brought in the name of the assignee when authorized by statute, or when a new contract has been made with him.

Demill vs. Ins. Co., 4 Allen (N. B.), 341; *Cohn vs. Nlag. Ins. Co.*, 60 N. Y., 619; *Clinton vs. Ins. Co.*, 45 N. Y., 454.

e. In the case of policies payable "to whom it may concern," suit should be brought in the name of the person or persons for whose benefit it was intended, and when the policy is in the name of the agent, suit may usually be brought in the name of the agent or of the principal.

Williams vs. Ins. Co., 2 Met., 303; *Strohn vs. Hartford Ins. Co.*, 37 Wis., 648; *Walsh vs. Ins. Co.*, 32 N. Y., 427; *Solmes vs. Rutgers F. Ins. Co.*, 3 Keyes (N. Y.), 416.

f. The assignee of a policy which has become a new contract with him, may properly sue in his own name.

Shepard vs. Union Ins. Co., 38 N. H., 232.

g. When there is more than one party interested in the policy, the action should be in the name of all.

Fowler vs. Atlantic Ins. Co., 8 Bos., 330; *Marsh vs. Robinson*, 4 Esp., 98.

h. When the contract is with the assured, his executors, administrators and assigns, the right of action rests with the personal representative.

Wyman vs. Wyman, 261 N. Y., 253.

i. The declaration must sufficiently set forth the insurable interest of plaintiff at the time of loss; that the loss arose from peril insured against, and per-

formance of policy conditions by the plaintiff; also substantially the contract itself, and when application is made part of policy it also must be declared on.

Henshaw vs. Ins. Co., 2 Blatch. (U. S.), 99; *Ferrer vs. Home Ins. Co.*, 47 Cal., 416; *Freeman vs. Fulton Ins. Co.*, 38 Barb. (N. Y.), 247; *St. Louis Ins. Co. vs. Glasgow*, 8 Mo., 718; *Doyle vs. Ins. Co.*, 44 Cal., 264.

See further on this subject under PLEADING, PRACTICE.

DIGEST OF RECENT CASES.

ACTION—FORM AND PLACE OF.

1. A policy is not necessary to enable the insured to maintain an action on the contract, and when none is issued the contract may be proved by any competent evidence.

Goodall vs. N. E. Ins. Co., 25 N. H., 169; *M'Culloch vs. Eagle Ins. Co.*, 1 Pick., 278; *Kennebec Co. vs. Augusta & Banking Co.*, 6 Gray, 204; *Pierce vs. Nashua Ins. Co.*, 50 N. H., 297.

A court of equity may compel the delivery of the policy, and having taken jurisdiction for this purpose will, to avoid circuitry of action, go on and afford the complete remedy.

Tayloe vs. Merchants Fire Ins. Co., 9 How., 390; 3 Pars. on Con., 374.

Gerrish vs. German Ins. Co., N. H. S. C., 55 N. H., 355; 8 *Ins. Law Journal*, 609.

2. Plaintiff brought suit in the United States Circuit Court at Baltimore, to recover on a policy "on his stock of fancy goods, toys and other articles in his line of business," and prohibiting the keeping without consent, among other things, fire-crackers and fire-works. Consent was indorsed to keep fire-crackers. The fire originated among a stock of fire-works. It was held that the policy was avoided by the violation, and plaintiff was not allowed to show that fire-works were in his line of business and their presence known to the agent. This decision was affirmed by the United States Supreme Court. The courts of New York had disapproved of the exclusion of such evidence, and upon a policy covering the same stock, in the same words, had held the company liable. This action was brought to reform the policy on the ground that it was intended to cover fire-works. *Held*, that the plaintiff having elected to treat his policy as sufficiently broad

to cover his real cause of action in Baltimore, he must abide by his election.

Steinbach vs. Relief Fire Ins. Co., N. Y. S. C., 77 N. Y., 498; 5 Ins. Law Journal, 158.

3. An action may be brought for reformation of the contract, and for a recovery at the same time upon the contract when reformed, and it is not irregular to try such action before a judge and jury.

New York Ice Co. vs. N. W. Ins. Co., 23 N. Y., 357; Pitcher vs. Hennessy, 48 N. Y., 415.

Where the pleading contains no specific allegation of a mistake of fact, but avers that which shows that the parties were mistaken as to the effect of the language they used; *Held*, that this is sufficient averment of matter upon which a reformation of contract may be based.

Pitcher vs. Hennessy, supra.

Parol evidence tending to show that the insured sought to have a policy phrase corrected to correspond with the facts, but was dissuaded by the insurer, may be admitted to estop the insurer from setting up the strict language of the policy as a bar to recovery, or when it tends to make a case for reformation of the contract.

Many vs. Beekman Ins. Co., 9 Paige, 188; Pitcher vs. Hennessy, 48 N. Y., 415; McCall vs. Ins. Co., N. Y. C. A., Sept., 1876 (6 Ins. L. J., 3); Van Tuyl vs. Westchester Fire Ins. Co., 55 N. Y., 657; Cone vs. Niagara Fire Ins. Co., 60 N. Y., 619.

Maher vs. Hibernia Ins. Co., N. Y. C. A., 67 N. Y., 283.

4. Default admits material allegations and leaves nothing but the assessment of damages to be determined. Averments of loss need not set forth value of each article of property destroyed. Averments of existence of policy are not necessary when date and duration of policy and date of fire are given. When the declaration avers that no other insurance existed, this obviates the necessity of a statement as to amount of other insurance in proof of loss. It is not necessary to aver that the notary before whom proof of loss is made is disinterested; the company must prove him to be interested.

Phœnix Ins. Co. vs. Duff, Ill. S. C., 9 Ins. Law Journal, 23.

5. Notwithstanding the provisions of the Iowa Code, (§ 2626,) requiring a reply to be filed before noon of the day succeeding that on which the answer was filed, the Court has power to allow it to be done at a later day. The granting of a continuance is within the discretion of the trial court, which will not be reviewed unless abused. The filing and consideration of affidavits in resistance thereto does not constitute error. Where proofs were forwarded and the only objection was the absence of value, and a new objection that the proofs were not under seal is the only one relied on; *Held*, that having made a specific objection, which has been raised, all others must be deemed to have been waived.

Ayres vs. Hartford Ins. Co., 17 Iowa, 176; *Young vs. Hartford Ins. Co.*, 45 Iowa, 377.

Williams vs. Niagara Ins. Co., Iowa S. C., 50 Iowa, 561; 9 *Ins. Law Journal*, 58.

6. The policy insured R., his executors, administrators, and assigns, and provided that it might be continued for such further term as might be agreed on. After the death of R. intestate, it was continued by his widow who was administratrix, while the property descended to the son, with dower to the widow. *Held*, that there being a question whether the money would belong to the widow, as executrix, or follow the property, it is doubtful if an action at law could be maintained by her as executrix, and suit was properly brought in equity.

Case of Ga. Home Ins. Co. vs. Kinnier's Administratrix, distinguished.

Portsmouth Ins. Co. vs. Reynolds, Va. S. C. A., 9 *Ins. Law Jour.*, 606.

7. Under sections 3,408 and 3,409 of the Code, an action against an insurance company must be instituted in the county where its principal office is located, or where it has an agency or place of doing business when suit is brought, and which agency or place of doing business was located in such county at the time the cause of action accrued or the contract was made out of which the cause of action arose. A party held a fire policy issued in the county of Bibb, from an agency of the Empire State Ins. Co., whose chief office was in Richmond county. Afterwards the Geor-

gia Home Mut. Ins. Co., located in the county of Muscogee, purchased from the former its insurance business, received its assets, and assumed the payment of its indebtedness due or to become due on its policies. No contract was made by the latter company with the holder of the policy, and nothing occurred to establish any relation between them, or to give the person assured any claim on the company except such equitable rights as he might have growing out of the contract between the two corporations. The house insured was located in Twiggs county, and the loss occurred after the companies had bargained, as stated. An action on the policy was brought in the county of Bibb, against both companies jointly—the Home only having an agency or place for doing business in that county. Service on the Empire Company was made by leaving a writ at the place where its agency was when the policy issued. *Held*, that such action cannot be maintained against the Empire State Ins. Co., as it had no agency or place of doing business in the county of Bibb when suit was commenced; and this being so, it cannot be sustained separately against the Home Ins. Co., as there was no such privity or relation between it and the assured which would entitle him to a separate action against said company on the contract made between the two corporations.

Empire State Ins. Co. et al. vs. Collins, Ga. S. C., 54 Ga., 376.

8. Where the property as shown by the policy was held in severalty: *Held*, that if the form of the contract presented insuperable impediments to the enforcement at law of the separate rights—a point which is not examined—the parties are not without remedy. A court of equity, if necessary, could have entertained the case and protected the rights of all. The inability of the assured to sue at law, jointly, in case such inability existed, is no answer to the suit by the assignee where all the interests have been united by assignment in one ownership.

Mercantile Ins. Co. vs. Holthouse, Mich. S. C., 9 Ins. Law Journal, 535

9. In a total loss of items separately specified and insured, an averment may be sufficiently made of the whole policy, and a

showing of value and loss on the property as a whole, where there was default in the suit, will be sufficient proof of loss without separately proving the value of each item.

Phoenix Ins. Co. vs. Perkey, Ill. S. C.

PARTIES TO.

10. In a policy loss payable to mortgagee, the action is properly brought in the name of the insured.

Referring also to the same case in N. J. Supreme Court, 9 Vroom, 140.

Franklin F. Ins. Co. vs. Martin, N. J. C. E., 40 N. J., 568.

11. When a part owner of a vessel effects a policy for the benefit of whom it may concern, a suit in case of loss may be maintained for the whole upon such policy, in the name of the party effecting the policy, or, in case of his death, by his administrator. *Thus:* Alexander, owning a fourth of the *Abby Brackett*, mortgaged the same to the plaintiff to secure a note of \$1,500, and procured an insurance for \$2,000, "on account of whom it may concern, loss payable to him;" the vessel being lost, and Alexander dead: *Held*, 1, that his administratrix could recover in an action on the policy; 2, that payment of the judgment in her favor by the underwriters, was a bar to a suit by the mortgagee.

Sleeper vs. Union Ins. Co., Me. S. J. C., 65 Me., 385.

12. On a policy of insurance against loss by fire, under seal, issued to the owner of the property, in which the insurer covenants to make good unto the insured, his executors, administrators, or assigns, all such damage or loss as might happen, etc., the owner may sue in his own name, although it may be written on the face of the policy, "Loss, if any, payable to A. B., as mortgagee." The direction on the policy to pay to the mortgagee is not an assignment of the policy. Its legal effect is that of a direction, in advance, as to the mode of payment, which, when made, is performance in the manner agreed to by the insured. Under such a direction, if assented to by the insurer, the person in whose favor the appointment is made acquires equitable rights, which the insurer is bound to regard, but the contract with the insured is not thereby merged or extinguished.

Martin vs. Franklin Fire Ins. Co., N. J. C. E., 38 N. J., 140.

13. The policy insured C. on his dwelling. C. subsequently conveyed to F. under deed of trust to secure a loan, and loss was made payable to F. by endorsement on the policy. Afterwards C. sold to G. and memorandum was made on register of the company, "Transferred to G." After the loss G. paid F. and brought suit in his own name. *Held*, that G., and not F., was the party insured, and the suit was properly brought by G.

Griswold vs. Am. Cent. Ins. Co., Mo. S. C., 70 Mo., 654; 9 Ins. Law Jour., 254.

14. The party to sue for a breach of a simple contract must be the party from whom the consideration moves. The policy insured W. against loss, payable to C. C. was mortgagee, and obtained the policy, on which he paid the premiums, with the consent of W. *Held*, that the promise, although in terms to W., is not an assignment but a promise to pay C., and must be regarded as directly to C. *Held*, that C., and not W., is the original contracting party and the proper person to sue, according to the law of New Hampshire.

Nevins vs. Rockingham Fire Ins. Co., 25 N. H., 22; Rollins vs. Columbian Fire Ins. Co., 25 N. H., 202; Folsom vs. Ins. Co., 33 N. H., 231; Blanchard vs. Ins. Co., 33 N. H., 9; Barnes vs. Ins. Co., 45 N. H., 24; Pierce vs. Ins. Co., 50 N. H., 297; Granger vs. Ins. Co., 5 Wend., 200; Conover vs. Ins. Co., 3 Den., 254; Loring vs. Manf. Ins. Co., 8 Gray, 28; May on Ins., sec. 172, 173; Dicey on Parties, 81; Chitty on Contracts, 62; Crowe vs. Rogers, 1 Str., 592; Price vs. Easton, 4 B. & Ad., 434; Butterfield vs. Hartshorn, 7 N. H., 351; Dicey on Parties, 81-85, 117, 127, 136, 137; Lake on Contracts, 221, 313; Chitty on Con., 132; 2 Pars. on Notes and Bills, 438; Drayton vs. Dale, 2 B. & C., 293; Big. on Est., 447; 1 Pars. Con., 467, 468; Carnegie vs. Morrison, 2 Met., 381; Brewer vs. Dyer, 7 Cush., 337; Met. Con., 205-211.

Held, that as the insurance exceeded the incumbrance, C. could bring an action in his own name, as the agent of W., for the surplus.

Paley on Agency, 362; Story on Agency, sec. 394; Barnes vs. Union F. & Mar. Ins. Co., 45 N. H., 21, 28.

Chamberlain vs. N. H. Fire Ins. Co., N. H. S. C., 55 N. H., 249; 4 Ins. Law Jour., 649.

15. Suit is properly brought in the name of the party to whom the loss is payable, and for whom the insurance is effected, whether the insurance was effected by mortgagor or mortgagee,

and whether the mortgage was paid in whole or part or otherwise. If the loss is payable to mortgagee suit may be maintained in the name of the mortgagee, who may recover the full amount of the loss within the amount due, secured by the mortgage. If the mortgage has been fully paid, suit should be by the mortgagee as trustee of an express trust.

Berthold vs. Clay F. and M. Ins. Co., St. Louis, Mo., C. A.

16. Two ships, the property of the same owner, collided; the underwriters paid the insurance effected on the lost ship, and then claimed to rank *pari passu* with the owners of the cargo destroyed, in the distribution of the fund lodged in court by the owner as proprietor of the ship which did the damage. *Held*, that the underwriter's right must be asserted in the name of the person insured, but if he be the person who has caused the damage, the right cannot be maintained against himself.

Simpson vs. Thompson, Eng. House of Lords, 3 L. R. App. Cas., 279; 7 Ins. Law Jour., 800.

See Cross Index at end of volume, for other cases bearing on ACTION.

ADJACENT BUILDINGS.

ABSTRACT OF THE LAW.

a. Misstatements or omissions in the application concerning adjacent buildings where not made a part of the contract, are simply representations which will not work a forfeiture unless material to the risk or fraudulently made, and when such statement by its terms, is confined to certain buildings or within a certain distance, the insurers are bound to inquire concerning those more distant at their peril, even though material.

Gates vs. Madison Co. Mut. Ins. Co., 5 N. Y., 469; Peoria M. F. Ins. Co. vs. Perkins, 16 Mich., 380; Hall vs. People's Mut. F. Ins. Co., 6 Gray (Mass.), 185; Allen vs. Charlestown Ins. Co., 5 Gray (Mass.), 387; Girard F. & M. Ins. Co. vs. Stepenson, 37 Penn. St., 290; Tebbetts vs. Hamilton & Co. Ins. Co., 1 Allen (Mass.), 305; Hardy vs. Ins. Co., 4 Allen, 217; Wilson vs. Ins. Co., 6 N. Y., 53; Brown vs. Ins. Co., 18 N. Y., 385.

b. But a failure to make a full disclosure, or a substantial misstatement when the application is a part of the contract, will work a forfeiture whether material or not.

Hardy vs. Union & Co. Ins. Co., 4 Allen (Mass.), 217; Frost vs. Saratoga Ins. Co., 5 Den. (N. Y.), 154; Murdock vs. Chenango Ins. Co., 2 N. Y., 210; Chaffee vs. Cattaraugus Co. Ins. Co., 18 N. Y., 376.

c. It is sufficient, however, if the description be substantially correct, the inadvertent omission of trifling or temporary structures, will not work a forfeiture.

Clark vs. Union Mut. Ins. Co., 4 N. H., 333; *Hall vs. People's Ins. Co.*, 6 Gray (Mass.), 185; *White vs. Ins. Co.*, 8 Gray (Mass.), 566; *Richmondville Seminary vs. Ins. Co.*, 14 Gray (Mass.), 459.

d. Changes in adjacent buildings subsequently occurring, even though they increase the risk, need not be disclosed unless specially called for, or within the control of the insured, but if an increase of risk, and within the control of the insured, they will work a forfeiture under a policy stipulation to that effect.

Stebbins vs. Globe Ins. Co., 2 Hall (N. Y.), 632; *Miller vs. Western Farmer's Ins. Co.*, 1 Handy (Ohio), 208.

See further on this subject, under BUILDING, DESCRIPTION, POLICY, RISK, SURVEY, WARRANTY.

See Cross Index at end of volume, for cases bearing on ADJACENT BUILDINGS.

ADJUSTMENT.

ABSTRACT OF THE LAW.

a. Adjustment must be based upon the actual value of the property at the time of loss, which value must be determined according to the nature of the property and the peculiar circumstances of the case.

Etna Insurance Co. vs. Jackson, 11 Bush (Ky.), 587; *Equitable Ins. Co. vs. Quin*, 11 L. C., 170; *American Ins. Co. vs. Griswold*, 14 Wend. (N. Y.), 399.

b. An adjustment does not necessarily entitle the insured to recovery. It is simply an agreement as to amount, which is, in the absence of fraud, generally final, if the liability exists at all.

Mathews vs. General &c. Ins. Co., 9 La. An., 590.

c. The insured is not excluded from proving an additional claim inadvertently omitted by an adjustment.

Elliott vs. Royal Ass. Co., L. R., 2 Exch., 240.

d. But in the absence of fraud, final settlement of the claim is usually conclusive on both parties.

Bullen vs. Harrison, Cowp. 585; *Bilbie vs. Lumley*, 2 East., 469.

e. A compromise or settlement, when finally agreed to and accepted, is usually binding in the absence of fraud, but if there be no consideration, or facts be subsequently discovered which could not have been known before, or the compromise be made without sufficient authority, it is not conclusive.

Redfield vs. Holland Purchase Ins. Co., 56 N. Y., 354; *Farmers & Merch. Ins. Co. vs. Chesnut*, 50 Ill., 111; *Brown vs. Hartford F. Ins. Co.*, 117 Mass., 479; *Mayhew vs. Phoenix Ins. Co.*, 23 Mich., 105; *Wadsworth vs. Davis*, 18 Ohio St., 123.

f. Under a clause in the contract limiting the liability of the company or the amount of insurance to a certain proportion of the value or the loss, such proportion will usually be deemed to be the measure of valid insurance or indemnity, and contribution by other insurers will be determined accordingly. The fair limitations of the contract will not be exceeded to furnish a fuller indemnity, but in case of ambiguity a construction will be given most favorable to the insured.

Holmes vs. Charleston Mut. F. Ins. Co., 10 Met. (Mass.), 211; *Post vs. Hampshire Mut. F. Ins. Co.*, 12 Met. (Mass.), 555; *Goodall vs. N. E. F. Ins. Co.*, 25 N. H., 169; *Haley vs. Dorchester Mut. F. Ins. Co.*, 12 Gray (Mass.), 545; *Ashland &c. Ins. Co. vs. Housinger*, 10 Ohio St., 10; *Eagan vs. Mutual Ins. Co. of Albany*, 5 Denio (N. Y.), 326; *Sanders vs. Hillsborough Ins. Co.*, 44 N. H., 238; *Singleton vs. Boone Co. Mut. Ins. Co.*, 45 Mo., 250.

g. A limitation as to the proportion which may be insured, in the charter or by-laws of a mutual company, will not affect the validity of a policy in the absence of fraud or misrepresentation by the insured, though it may determine the amount of recovery, but a breach of covenant by insured will work a forfeiture where the value is stipulated.

Cumberland Valley Mut. Prot. Co. vs. Schell, 29 Penn. St., 31; *Mitchell vs. Lycoming Ins. Co.*, 51 Penn. St., 402; *Goodall vs. Ins. Co.*, *supra*; *Williams vs. N. E. Mut. Ins. Co.*, 31 Me., 219.

h. A policy insuring a single sum in gross on various subjects, will not be apportioned after the loss, so as to limit the liability on the individual subjects.

Nicolet vs. Ins. Co., 3 La., 371; *Rex vs. Mut. Ins. Co.*, 20 N. H., 198.

See further on this subject under AGENT, CONTRIBUTION, GENERAL AVERAGE, LOSS, MEASURE OF DAMAGES, PARTICULAR AVERAGE.

DIGEST OF RECENT CASES.

ADJUSTMENT—EFFECT OF.

1. After the loss the insurers and insured made a written agreement fixing the loss and damage on the specific items, "subject to terms and conditions of several policies." *Held*, that this adjustment meant subject to all the terms and conditions, except such as are superseded by the fact that the loss or damage has been fixed. *Held*, that the adjustment ordinarily, but not necessarily, implies liability. Here, in view of the qualifying words, it means simply that the company will pay the loss as fixed under the terms and conditions of the policy, if, under them, the insured is entitled to payment.

Whipple vs North British & Mer. F. Ins. Co., *R. I. S. C.*, 11 *R. I.*, 139; 3 *Ins. Law Journal*, 71.

2. An adjustment, made with full knowledge of the fact that

other insurance had been procured without consent, is a waiver of the policy.

Egan vs. Ætna F. & M. Ins Co., W. Va. S. C. A.; *Webster vs. Phenix Ins. Co.*, 37 Wis., 57; *Hayward, assignee, vs. National Ins. Co.*, 52 Mo., 181.

Evidence that the secretary came on to adjust the loss, that he had the goods invoiced, that he apportioned the loss among the companies, that he sanctioned an indorsement of the amount of liability on the backs of the policies, and directed the preparation of a paper headed "Adjustment of losses," made out in duplicate, and one copy given to plaintiff, and afterward told plaintiff "We have done the best we could for you—we could not give you any more," is valid evidence of an adjustment by the company.

Gray vs. Peabody Ins. Co., W. Va. S. C., 10 W. Va., 560; 6 *Ins. Law Journal*, 769.

3. Where after a loss by fire of insured property, and an opportunity to investigate it, the insurer without any deception or fraud practiced upon it by the insured at the time of such investigation, agrees with the insured that it shall pay and he receive a certain sum in full on account of such loss, a recovery of that sum cannot be defeated by showing a breach of warranty in the policy, though unknown to the insurer at the time of such agreement. The property insured consisted of two buildings, together with furniture, wearing apparel, provisions, etc., and the buildings were erected by the insured upon a lot held by him on a lease for ten years. The answer avers that the insured, in making out his proofs of loss, falsely and fraudulently, with intent to mislead and to induce defendant to agree to pay, etc., stated that the *property insured* was, at the time of the fire, owned by him in fee simple. *Held*, that in view of the settlement made, the burden was upon the defendant to show that the assured had not an absolute title to the *property insured*, and that he had procured the settlement by false and fraudulent representations on that subject. A statement made to the adjuster by plaintiff, who could not speak English, which answered a question affirmatively that he owned the property in fee simple, was not inconsistent with the finding of the jury that plaintiff was not guilty of fraud.

Stache vs. St. Paul Fire and Marine Ins. Co., Wis. S. C.

4. An adjustment is a waiver of objections to notice and proofs of loss.

Havana Ins. and Banking Co. vs. Mayer, Ill. S. C.

5. An offer to compromise never estops the party making it from setting up any legal defense, or asserting any right to which the offer relates.

Cook vs. Continental Ins. Co., Mo. S. C., 70 Mo., 610; 9 Ins. Law Jour., 887.

6. The directors of an insurance company, whose duty it was, by its charter, in cases of injury by fire to property insured, to ascertain and determine the amount of loss or damage, voted to pay the plaintiff his full insurance on hay, and to give him the doors, windows, stair railings, and other articles saved from the fire and to pay him besides \$1,400. The plaintiff declined to accept, and thereafter the defendant company, in pursuance of a unanimous vote of the board of directors, at a legal meeting, withdrew all offers they had made the plaintiff, and notified him thereof. The plaintiff brought his action, and recovered a verdict for less than the sum offered in money. *Held*, that the defendants were estopped from alleging that they had determined the amount of the plaintiff's loss according to the contract.

Simpson vs. Ins. Co., N. H. S. C., 57 N. H., 160.

7. A settlement was made by the parties to a policy of marine insurance of their mutual demands, including items for partial losses and premiums earned under the policy, with an agreement that it should be canceled that day. The vessel insured had then been totally lost, of which fact both parties were ignorant. *Held*, that this settlement was a bar to a claim for the total loss.

Soper vs. Atlantic Ins. Co., Mass. S. J. C., 120 Mass., 267.

8. A letter from the company's general manager, informing the local agent that the person who denied the liability "was a representative and adjuster," who would adjust a certain loss, was the best evidence of its own contents, and where its absence was not excused, it was error to admit secondary evidence of its contents. But his specific authority to adjust another loss, would not warrant the jury in finding that he was authorized to adjust

the loss in question and bind the company. The scope of his authority is a question for the jury.

Phillips Ev., 470 (5th American ed.); Hough vs. City Fire Ins. Co., 29 Conn., 10; Keenan vs. Missonri State Mut. Ins. Co., 12 Iowa, 126.

Hartford F. Ins. Co. vs. Smith & Doll, Col. S. C., 7 Ins. Law Journal, 140.

9. Where the policy was made payable to the mortgagee, the insured had no authority to adjust the loss without consent of the party to whom it was payable.

Harrington vs. Fitchburg Mut. F. Ins. Co., Mass. S. J. C., 124 Mass., 126; 7 Ins. Law Jour., 618.

10. A policy clause in a mutual company that losses are to be adjusted and settled by the directors and no action can be brought until such adjustment is made, is one which the courts will enforce, unless dereliction on the part of directors be shown.

New Quay Mut. Ins. Co. vs. Jones, Eng. Q. B.

11. An adjustment of the loss does not estop the defense that the conditions of the policy had been violated.

Colonius vs. Hibernia F. Ins. Co., St. Louis, Mo., C. A.

See Cross Index at end of volume, for other cases bearing on ADJUSTMENT.

AGENT.

ABSTRACT OF THE LAW.

a. The party whom the agent represents must suffer for his act.

Draper vs. Charter Oak Ins. Co., 2 Allen (Mass.), 569; Smith vs. Empire Ins. Co., 25 Barb. (N. Y.), 497; Carpenter vs. Amer. Ins. Co., 1 Story, 57; Nicoll vs. Amer. Ins. Co., 3 Wood & Min., C. C. U. S., 529.

b. The agent cannot represent an interest adverse to his principal.

Utica Ins. Co. vs. Toledo Ins. Co., 17 Barb. (N. Y.), 132; Bently vs. Columbian Ins. Co. 17 N. Y., 421; N. Y. Cent. Ins. Co. vs. Nat. Prot. Ins. Co., 14 N. Y., 85.

c. The apparent scope of the agent's authority is its real scope to a party not cognizant of its limitations.

Lightbody vs. North Amer. Ins. Co., 23 Wend. (N. Y.), 18; Keenan vs. Mo. State Mut. Ins. Co., 12 Iowa, 126.

d. A "general" agent is one authorized to accept risks, agree upon the conditions of insurance, and issue and renew policies. His acts in all things

pertaining to the insurance before the delivery of the policy are those of his principal, and he may modify the terms of that instrument as he elects. But he cannot modify the essential character of the contract.

Gloucester Manf. Co. vs. Howard Ins. Co., 5 Gray (Mass.), 498; Post vs. Aetna Ins. Co., 43 Barb. (N. Y.), 351; Carroll vs. Charter Oak Ins. Co., 40 Barb. (N. Y.), 292; Viole vs. Germania Ins. Co., 26 Iowa, 9; Eastern R. R. Co. vs. Relief F. Ins. Co., 105 Mass., 570.

e. The possession of blank policies and renewals, duly signed, is evidence of such agency.

Carroll vs. Aetna Ins. Co., *supra*.

f. After the completion of the contract, however, the powers of such general agent are usually more restricted.

Bartholemew vs. Merch. Ins. Co., 25 Iowa, 507; Phoenix Ins. Co. vs. Lawrence, 4 Met. (Ky.), 9; Healey vs. Imp. Ins. Co., 5 Nev., 268.

g. General agents and officers of mutual companies are more restricted in their powers than those of Stock Co's, the policy holders being members of the company and bound by its charter and by-laws.

Brown vs. Chelsea Mut. F. Ins. Co., 14 Gray (Mass.), 203; Hale vs. Mech. Mut. Ins. Co., 6 Gray (Mass.), 169.

h. Knowledge by the agent as to the risk before the policy is issued, is generally knowledge by his principal, where the insured deals with the agent and not directly with the principal. Thus knowledge of defective title, incumbrance, other insurance, etc., by the agent, is knowledge by the principal, unless the insured, of his own motion, had misrepresented the facts in the application to the principal, without the agent's intervention.

Ames vs. N.Y. Union Ins. Co., 14 N.Y., 253; Roth vs. City Ins. Co., 6 McLean, 324; Clark vs. Union Mut. F. Ins. Co., 40 N. H., 323; Hodgkins vs. Montgomery Co. Mut. Ins. Co., 34 Barb., 213; Plumb vs. Cattaraugus Co. Mut. Ins. Co., 18 N. Y., 392; Patton vs. Merch. & Farm. Mut. Fire Ins. Co., 40 N. H., 375.

i. The general agent may often modify and extend the contract after its issue, especially if it be an open policy. He may correct an error in the policy, waive conditions as to payment of premiums, or breach of conditions.

Kennebec Co. vs. Augusta Ins. & Banking Co., 6 Gray (Mass.), 204; Warren vs. Peoria Mar. & F. Ins. Co., 14 Wis., 318; Carroll vs. Charter Oak Ins. Co., 40 Barb. (N. Y.), 292; Post vs. Aetna Ins. Co., 43 Barb., 351.

j. The powers of the local agent or sub-agent, without authority to make binding contracts or issue policies, do not usually extend to the modification of such contracts. Notice to such agent after issue of the policy, is not notice to the company concerning facts not within the apparent scope of his employment, nor can he bind the company by his representations in such case.

Mitchell vs. Lycoming Mut. Ins. Co., 51 Penn. St., 402; People's Ins. Co. vs. Spencer, 53 Penn. St., 353; Tate vs. Citizens' Ins. Co., 13 Gray (Mass.), 79.

k. Representations of agents relative to their principals, will be binding or not, according as the insured would or would not be justified in relying on them as authoritative.

Farmers' Mut. Ins. Co. vs. Marshall, 29 Vt., 23; Hackney vs. Alleghany Mut. Ins. Co., 4 Barr, 185.

l. The insurer cannot by stipulation make its authorized agent the agent of

the insured without first bringing a knowledge of the fact to the latter. A contrary doctrine, however, prevails in New York. See digest below.

Commercial Ins. Co. vs. Ives, 56 Ill., 402; *Eclectic Ins. Co. vs. Fahrenkrug*, 68 Ill., 463.

m. Knowledge of an agent having power only to receive and forward proposals, and to deliver policies and receive premiums, is not knowledge of the principal except in regard to facts within his special sphere, such as the answers to questions in the application when framed with his advice.

Wilson vs. Conway Ins. Co., 4 R. I., 141; *Lowell vs. Middlesex Mut. Ins. Co.*, 8 Cush. (Mass.), 127; *Malleable Iron Works vs. Phoenix Ins. Co.*, 25 Conn., 465.

n. Notice real or constructive of a limitation to the agent's power will estop the insured from alleging acts in excess of such power.

Mersereau vs. Phoenix Ins. Co., 66 N. Y., 274.

o. A notice of such limitation in the policy is sufficient as to acts subsequent to the issue of the policy.

Catoir vs. Amer. Ins. Co., 33 N. J., 487.

p. If the agent fills out the application or dictates the answers, whether on his own volition or at the request of the insured unless as agent of insured, the company is generally estopped from alleging their falsity.

Davenport vs. Peoria Ins. Co., 17 Iowa, 276; *Beebe vs. Hartford Ins. Co.*, 25 Conn., 51; *Pierce vs. Nashua Ins. Co.*, 50 N. H., 297; *Rowley vs. Empire Ins. Co.*, 36 N. Y., 550.

q. Knowledge of an agent limited to receiving applications, will not estop the company from setting up a breach of policy conditions, but *per contra* as to a general agent.

Ames vs. N. Y. Mut. Ins. Co., 14 N. Y., 253; *Combs vs. Hannibal Ins. Co.*, 43 Mo., 248; *Alexander vs. Germania F. Ins. Co.*, 66 N. Y., 464; *Chase vs. Hamilton Ins. Co.*, 20 N. Y., 52.

r. Private instructions are no limitation of the agent's authority as respects third parties having no knowledge of them.

Perkins vs. Washington Ins. Co., 4 Cow. (N. Y.), 645; *Com. Ins. Co. vs. Union Mutual Ins. Co.*, 19 How. (U. S.), 318; *Citizens' Mut. F. Ins. Co. vs. Sortwell*, 8 Allen (Mass.), 217.

s. An agent authorized to make contracts, may waive forfeitures and even reinstate a void policy.

Shearman vs. Niagara F. Ins. Co., 46 N. Y., 526; *Howell vs. Knickerbocker Ins. Co.*, 44 N. Y., 276; *Keeler vs. Niagara F. Ins. Co.*, 16 Wis., 523.

t. But where the agent's power to waive a forfeiture is expressly limited in the policy, the insured is bound by such limitation.

Mersereau vs. Phoenix Ins. Co., 66 N. Y., 274.

u. Knowledge of other insurance by the agent when the policy is issued, is a waiver of the condition requiring consent to be indorsed.

Hadley vs. Ins. Co., 55 N. H., 110; *Van Bories vs. U. S. Ins. Co.*, 8 Bush. (Ky.), 133; *Kenton Ins. Co. vs. Shea*, 6 Bush. (Ky.), 174.

v. Where the act is in excess of the real authority of the agent, the burden is on the insured to show that it was within the apparent scope of his authority. That authority is not to be assumed from the mere declarations of the agent, but from the nature of his business and his acts and the recognition accorded by the company.

Bush vs. Westchester F. Ins. Co., 63 N. Y., 531; *Allen vs. Ogden*, 1 Wash., 174; *Adriance vs. Rowell*, 52 Barb. (N. Y.), 270; *Perkins vs. Wash. Ins. Co.*, 4 Cow. (N. Y.), 645; *Imp. Ins. Co. vs. Murray*, 73 Pa. St., 13; *Miller vs. Phoenix Ins. Co.*, 27 Iowa, 203.

w. An authority to issue policies is not an implied authority to adjust losses, and the mere assumption of such authority will not give it.

Post vs. Aetna Ins. Co., 43 Barb. (N. Y.), 851; *Bush vs. Westchester Ins. Com.*, 63 N. Y., 531; *Marvin vs. Wilbur*, 52 N. Y., 270.

x. Notice to an agent is notice to the principal, unless the contract otherwise provides, and knowledge of such agent upon the issue of the contract is a waiver of the required notice.

Sexton vs. Montgomery Ins. Co., 9 Barb. (N. Y.), 191; *Dayton Ins. Co. vs. Kelly*, 24 Ohio St., 345; *Hadley vs. Ins. Co.*, 55 N. H., 110; *Van Bories vs. Ins. Co.*, 8 Bush., 183.

y. Revocation of authority must be brought to the knowledge of the insured to be binding upon him.

McNeille vs. Cont. Ins. Co., 66 N. Y., 23.

z. In respect to acts which the agent may delegate to another, the insurer is bound by the acts of the clerk or authorized representative of the agent.

Houghton vs. Ewbank, 4 Camp., 88; *Bodine vs. Exchange Ins. Co.*, 51 N. Y., 566.

See further on this subject under APPLICATION, BROKER, CONTRACT, MORTGAGOR AND MORTGAGEE, POLICY, REPRESENTATION, WARRANTY.

DIGEST OF RECENT CASES.

AGENT—WHEN COMPANY IS BOUND BY.

(a.) *When he is admitted agent of the company.*

1. Although in general an agent cannot delegate his powers so as to permit a partner to bind the company which he alone represents, yet if the general agent does not repudiate the risk when sent to him, the company is bound.

U. S. F. & M. Ins. Co. vs. Ins. Co. of N. A., Ind. S. C., 3 *Ins. Law Journal*, 169.

2. The agent of the company undertook to procure the insurance and do everything that was right, and had full knowledge of all the circumstances. *Held*, that the company was estopped to deny the indorsement of prior insurance upon the policy, conformably to its conditions. *Held*, that the neglect of the agent to indorse the required consent for subsequent insurance, under the same circumstances, was evidence from which the jury might find that the company had waived the condition requiring it. *Held*, that the company was bound by the representations of the agent, although the property was misdescribed in the application.

Clark vs. Ins. Co., 40 N. H., 333; *Barnes vs. Ins. Co.*, 45 N. H., 23, 24;

Pierce vs. Ins. Co., 50 N. H., 297; Marshall vs. Ins. Co., 27 N. H., 154; Campbell vs. Ins. Co., 37 N. H., 35.

Hadley vs. N. H. Ins. Co., N. H. S. C., 55 N. H., 110; 4 Ins. Law Journal, 611.

3. The application, which was the basis of the policy, covenanted that the statements contained in it were a full and true exposition of the facts so far as "known to the applicant" and "material to the risk." The application required the distances of all buildings within less than one hundred feet to be stated. One building within the prescribed distance was not stated. There was no evidence of fraudulent or intentional omission. The agent, who wrote the application, examined the premises before taking the risk, and evidently knew the fact. *Held*, that the failure to mention did not vitiate the policy.

Miner vs. Phoenix Ins. Co., 27 Wis., 693, and cases cited.

Wright vs. Hartford F. Ins. Co., Wis. S. C., 36 Wis., 522; 4 Ins. Law Journal, 251.

4. The agent, intrusted with certificates of contracts for intermediate insurance, duly signed, with authority to deliver to applicants for insurance, erased therefrom a material stipulation without knowledge of the insured of the circumstances of erasure, or of the agent's lack of authority to erase. *Held*, that the company will be bound to the same extent as if the erasure had been authorized. Where the agent delivered the certificate to the applicant, giving time for payment of premiums, and the company charged the agent with the amount of the premium, which was settled after the loss, a condition in the printed part of the policy of the company, according to the terms of which the insurance was effected, that no insurance is binding until actual payment of premium, must be considered as waived, although the agent had no express authority to give time for payment.

Dayton Ins. Co. vs. Kelly, Ohio S. C., 24 Ohio, 345; 4 Ins. Law Journal, 169.

5. Where title was fully and freely stated to agent as incumbered leasehold, and the agent filled the application stating it to

be unincumbered fee simple, *Held*, that the company was responsible for the false statement in the application.

Flanders on Ins., 101; Union Mut. Ins. Co. vs. Wilkinson, 13 Wallace, 222; 1 Ins. Law Journal, 607.

Planter's Ins. Co. vs. Sorrells, Tenn. S. C., 4 Ins. Law Journal, 195.

6. An insurance company establishing a local agency must be held responsible to the parties with whom they transact business, for the acts and declarations of the agent within the scope of his employment, as if they proceeded from the principal.

Masters vs. Madison County Mutual Ins. Co., 11 Barb., 624; Sarsfield vs. Metropolitan Ins. Co., 61 Barb., 479; 2 Am. Leading Cases, 5th ed., p. 917.

Continental Ins. Co. vs. Kasey, Va. C. A., 4 Ins. Law Journal, 208.

7. The agent who fills up the blanks or makes out the written application, is still the agent of the insurers and not of the insured. If any facts are fully disclosed to him, and he fails to state them in the application, it would be contrary to all sound principles to allow the defendants to take advantage of their own wrong.

Ins. Co. vs. Wilkinson, 13 Wallace, 222.

Cheek et al. vs. Columbia Ins. Co. et al., Tenn. S. C., 4 Ins. Law Journal, 99.

8. The power of a general agent to receive notice of other insurance, to indorse consent, and issue policies, includes the power to waive strict compliance with the terms of the contract. The power of such agent is plenary as to the terms and conditions of the contract, and he may make such memoranda and indorsements modifying the general provisions, and even inconsistent with them, as in his discretion may seem proper.

Gloucester Mfg. Co. vs. Howard Fire Ins. Co., 5 Gray, 497; Pitney vs. Glens Falls Ins. Co., 65 N. Y., 6; May on Ins., § 129-143; Ins. Co. vs. Wilkinson, 13 Wall., 222; Thompson vs. St. Louis Mut. Life Ins. Co., 2 Ins. L. J., 422; Peck vs. New London Mut. Ins. Co., 22 Conn., 584; Van Bories vs. U. S. Life Ins. Co., 8 Bush. (Ky.), 133; May on Ins., § 370, and cases cited.

Pechner vs. Phaenix Ins. Co., N. Y. C. A., 65 N. Y., 195; 4 Ins. Law Journal, 782.

9. Where an agent was regularly authorized to contract for

insurance, and was furnished with blank policies for filling up and delivering to the parties with whom he contracted, he was authorized to make binding preliminary contracts to insure, to be consummated by filling up and delivering the policy, and an agreement to insure for three years was not a parol contract for insurance for that period, but a preliminary agreement to insure within the scope of his authority.

Ellis vs. Albany City Fire Ins. Co., 50 N. Y., 402.

The validity of the contract was not affected by credit being given until the delivery of the policy. A recovery of amount insured was proper in action for breach of contract.

Trustees &c. vs. Brooklyn Fire Ins. Co., 19 N. Y., 305; *Anchelon vs. Excelsior Ins. Co.*, 27 N. P., 216; *Ellis vs. Albany City Fire Ins. Co.*, 50 N. Y., 402.

Private general instructions to the agent by the company unknown to the insured, do not affect the rights of the parties.

Angel vs. Hartford Fire Ins. Co., N. Y. C. A., 59 N. Y., 171; 4 *Ins. Law Journal*, 427.

10. A person authorized to accept risks, settle the terms of insurance, and issue and renew policies, must be regarded as the general agent of the company.

Post vs. Aetna Ins. Co., 43 Barb., 351.

The possession of blank policies and renewal receipts, signed by the president and secretary, is evidence of such agency.

Carroll vs. Charter Oak Ins. Co., 40 ib., 292.

The power of such agent of a stock company is plenary as to the amount and nature of the risk, rate of premium, and generally as to the terms and conditions of the contract. He may make such modifications in the policy conditions before delivery, and sometimes even afterward, as in his discretion seems proper.

May on Ins., § 129; *Gloucester Manfg. Co. vs. Howard Fire Ins. Co.*, 5 Gray, 498.

Where such an agent filled the application, and at the time of doing so existing policies of a company for which he was also agent were handed to him at his request, he must be supposed to have read them and known their contents, and such knowledge will be a waiver of a condition in the subsequent policy requiring the indorsement of other insurance.

Van Bories vs. United Ins. Co., 8 Bush. (Ky.), 133; *Horwitz vs. Equitable*

Ins. Co., 40 Miss., 557 ; Hubbard vs. Hartford Fire Ins. Co., 33 Iowa, 325 ; Couch vs. City Fire Ins. Co., 37 Conn., 248 ; Pechner vs. Phoenix Ins. Co., 6 Lansing, 411 ; Carroll vs. Charter Oak Ins. Co., 10 Abb., N. S., 166 ; Rowley vs. Empire Ins. Co., 36 N. Y., 550 ; Plumb vs. Cattaraugus Co. Mut. Ins. Co., 18 N. Y., 392 ; May on Ins., § 369-370.

Pitney vs. Glens Falls Ins. Co., N. Y. Com. A., 65 N. Y., 6 ; 4 Ins. Law Jour., 765.

11. The agent of a foreign company in Pennsylvania must, from the very necessity of the case, be clothed with greater power than an ordinary agent appointed by a company that can itself act within the State, and a mutual mistake of agent and insured may be ground for estoppel against the company.

Act of April 11, 1868. P. L., 83.

Queen's Ins. Co. vs. Harris, Pa. S. C., 5 Ins. Law Journal, 558.

12. Authorized agents not having their powers specified will be presumed to be general agents. They may have no power to waive express policy conditions, but the assurance of such an agent that the policy condition requiring an indorsement on the policy of other insurance had been complied with, will operate as an estoppel against the company.

Worcester Bank vs. Hartford Fire Ins. Co., 11 Cush., 265, distinguished.

Mentz vs. Lancaster Fire Ins. Co., Pa. S. C., 5 Ins. Law Journal, 447.

13. It is a settled law of the Wisconsin Supreme Court that an agent authorized to take risks and issue policies against fire, may waive by parol a condition in the policy issued.

Miner vs. Phoenix Ins. Co., 27 Wis., 693 ; McBride vs. Republic Ins. Co., 30 Wis., 562 ; Devine vs. Home Ins. Co., 32 ib., 471 ; Parker vs. Amazon Ins. Co., 34 ib., 363 ; Webster vs. Phoenix Ins. Co., 36 ib., 67 ; Wright vs. Hartford Ins. Co., ib., 522.

The case is not taken out of this rule by a special agreement written in the body of the policy permitting the use of gasoline when the generator should be removed 30 feet, while the agent agreed by parol that it might be used temporarily pending a change of the generator.

McBride vs. Allemania Fire Ins. Co., 30 Wis., 562.

Winans vs. Allemania Fire Ins. Co., Wis. S. C., 5 Ins. Law Journal, 203.

14. The policy provided that other insurance, without consent written thereon, should avoid the insurance; also that nothing but a specific agreement indorsed on the policy should be a waiver of any of its conditions. All the dealings were with the agent, with whom negotiations were afterward entered into for other insurance, which was finally obtained elsewhere. The agent when informed of the additional insurance said it would make no difference to the company, and in other conversations offered no objection nor suggested that any breach of condition had been effected. *Held*, that the actions of the agent estopped the company from setting up a breach of condition. *Held*, where there was no want of power on the part of the agent to act, plainly shown, and where the policy was to be countersigned by him, the assured was justified in assuming that the agent had power to bind the company by his acts.

Cases of *Ins. Co. vs. Colt*, 560; *Spitzur vs. St. Marks Ins. Co.*, 6 Duer's R., 6; *Blanchard vs. Atlantic Ins. Co.*, 33 H. A., 9; *Couch vs. City Fire Ins. Co.*, 38 Conn., 181; *Amer. Ins. Co. vs. Gilbert*, 27 Mich., 429; *Van Buren vs. St. Joseph Co. Village Fire Ins. Co.*, 28 Mich. R., 398; *Barratt vs. Union Mutual Fire Ins. Co.*, 7 Cush., 175; *Forbes vs. Ins. Co.*, 9 Cush., 471; *Hale vs. Mechanics' Mutual Fire Ins. Co.*, 6 Gray, 173; *Stark Co. Mutual Ins. Co. vs. Hurd*, 19 Ohio, 149; *Security Ins. Co. vs. Fay*, 22 Mich., 467; *Continental Life Ins. Co. vs. Willits*, 24 Mich., 265, distinguished.

Hibernia Ins. Co. vs. O'Connor, 29 Mich. R., 241; *Mich. State Ins. Co. vs. Lewis*, 30 Mich., 41; *Continental Ins. Co. vs. Horton*, 28 Mich., 173; *Peoria Ins. Co. vs. Perkins*, 16 Mich., 380; *Ætna Live Stock, Fire and Tornado Ins. Co. vs. Olmstead*, 21 Mich., 246; *N. A. Fire Ins. Co. vs. Throop*, 22 Mich., 146; *Peoria Fire and Marine Ins. Co. vs. Hall*, 12 Mich., 202; *Niagara Fire Ins. Co. vs. De Graff*, 12 Mich., 124; *Ins. Co. vs. Mahone*, 21 Wal., 152; *Mitler vs. L. Ins. Co.*, 12 Wallace, 285; *Ins. Co. vs. Slaughter*, 12 Wallace, 404; *Ins. Co. vs. Wilkinson*, 13 Wallace, 222; *Ins. Co. vs. Colt*, 20 Wallace, 560; *Ins. Co. vs. Webster*, 6 Wallace, 129; *Peck vs. New London Co. Mutual Ins. Co.*, 22 Conn., 584; *Hatton vs. Beacon Ins. Co.*, 16 Q. B. (U. C.), 316.

Westchester Fire Ins. Co. vs. Earle & Reynolds, Mich. S. C., 33 Mich., 14; 5 *Ins. Law Jour.*, 651.

15. Delivery by an agent of a policy and renewal certificate as valid instruments is a waiver of the formal terms and makes them binding, even when not countersigned as required.

Hibernia Ins. Co. vs. O'Connor, 29 Mich., 241.

Where an agent in giving a policy has by his own conduct misled parties into giving applications or accepting conditions

under a misrepresentation as to their literal accuracy, the company is estopped by his action.

30 Mich., 41; 28 Mich., 173; 16 Mich., 380; 21 Mich., 246; 22 Mich., 146; 12 Mich., 202; 12 Mich., 124; 21 Wall., 152; 12 Wal., 285; 12 Wal., 404; 13 Wal., 222; also, 20 Wal., 560; 6 Wal., 129; 22 Conn., 575; 16 Q. B. (U. C.), 313.

Westchester Fire Ins. Co. vs. Earle & Reynolds, Mich. S. C., 33 Mich., 14; 5 Ins. Law Jour., 61.

16. Where the insured signs the application in blank at the request of the agent, and the latter fills up without the knowledge of the insured as to the answers, or writes incorrect answers when correct answers were given, the company is liable though the application be a warranty.

Bartholomew vs. Merchants' Ins. Co., 25 Iowa, 508; *Ayres vs. Hartford Fire Ins. Co.*, 17 Iowa, 176.

The agent acted for the company, not for the insured, in filling up the application, where it did not appear that he was requested or expected by the insured to write the answers.

Rowley vs. Empire Ins. Co., 36 N. Y., 550; *Commercial Ins. Co. vs. Ives*, 56 Ill., 402; *Anson vs. Winnesheik Ins. Co.*, 23 Iowa, 84.

In the absence of evidence it cannot be presumed that the insured intended to authorize the agent to answer for him.

Kingston vs. Aetna Life Ins. Co., Iowa S. C., 5 Ins. Law Jour., 352.

17. The sub-agent offered to procure a loan through the State agent, who was authorized to negotiate loans with the approval of the company, and for that purpose procured from the applicant his signature to the application, and also the mortgage, fire policies, and search, all of which were received and approved by the company. The sub-agent then procured the applicant's signature to a printed order, which when so signed read as follows: "Pay to——, dollars on account of——in——drafts, to the order of H. G. Angle." The agent filled the blanks, canceled the printed words, "drafts to the order of," and wrote the words "current funds," in the blank space preceding "drafts." Through the altered instrument he procured the funds from the company and embezzled them. *Held*, that the applicant by intrusting the order to the agent gave him implied authority to fill the blanks at his discretion, but did not authorize him to alter the material terms

of the instrument by erasing what was printed or written, nor by filling the blanks with stipulations repugnant to what was written or printed.

Goodman vs. Simonds, 20 How., 361; *Bank vs. Neal*, 22 ib., 108; *Violet vs. Patton*, 5 Cran., 142; *Russell vs. Langstaffe*, 2 Doug., 514; *Collis vs. Emmet*, 1 H. Black., 313; *Montague vs. Perkins*, 22 Eng. L. & Eq., 516; 1 Greenl. Ev., 12th ed., § 567; *Bank vs. Douglas*, 31 Conn., 180.

Held, that the order so altered was a forgery, and was honored by the company at its peril. The applicant was entitled to a return of his mortgage and policies.

Garduer vs. Walsh, 32 Eng. L. & Eq., 162; *Ivory vs. Michael*, 33 Mo., 440; *Wood vs. Steele*, 6 Wal., 80; 2 Pars. on B. & N., 566; *Goodman vs. Simonds*, 20 How., 365; *Andrew vs. Pond*, 13 Pet., 65; *Fowler vs. Brently*, 14 Pet., 318; *Brown vs. Davis*, 3 Term, 80; *Hawley vs. Cramer*, 4 Cow., 712; *Hill vs. Simpson*, 7 Ves. jr., 170; *Kennedy vs. Green*, 3 Myl. & Keen, 722; *Booth vs. Barnum*, 9 Conn., 286; *Pitney vs. Leonard*, 1 Paige, 461; *Pringle vs. Phillips*, 5 Sand., 157.

Angle vs. Northwestern Mut. Life Ins. Co., U. S. S. C., 5 *Ins. Law Jour.*, 415.

18. The policy contained a condition that "if a building is insured that is on leased ground, the same must be specifically represented to the company and expressed in the policy in writing, otherwise the insurance shall be void." Part of the property insured was a building on leased ground, which was not expressed in the policy. The insurance was procured by L., an insurance agent, who was in partnership with D., the authorized agent of the company, with the assent of D., and knowledge and acquiescence of the company. Subsequently, but prior to issuing the policy, L. was also appointed its agent by the company, in accordance with a promise some time subsisting. L. was informed of the fact that the building was on leased ground. *Held*, that the policy clause was a condition precedent which, if allowed to take effect, rendered the insurance void *ab initio*. *Held*, that the insured and agent meant to contract and did contract for insurance of the building on leased ground.

Cone vs. Niagara Ins. Co., 60 N. Y., 619.

Held, that knowledge of the agent was knowledge of the company.

Bodine vs. Exchange Ins. Co. 51 N. Y. 117.

Held, that no objection having been interposed below, to the legal assumption of the court, that L. was the agent of the company, it must be conceded as a fact.

Tallman vs. Atlantic Ins. Co., 3 Keyes, 87.

Held, that the condition may be waived by the insurer by express words, or by acts done under such circumstances as would impute a fraudulent purpose, and as well estop him from setting up the condition against the insured. *Held*, that the intention of the parties must be presumed to have been to make a valid contract, and the company is estopped by knowledge of the facts from setting up the condition.

Cases of *Rowley vs. Empire Ins. Co.*, 3 Keyes 557; *Plumb vs. Catt. Ins. Co.*, 18 N. Y., 392; *Ames vs. N. Y. Ins. Co.*, 14 N. Y., 253; *Bidwell vs. N. W. Ins. Co.*, 24 N. Y., 302; *Bodine vs. Exchange Ins. Co.*, 51 N. Y., 117; *Cone vs. Niagara Ins. Co.*, 60 N. Y., 619; *Maher vs. Hibernia Ins. Co.*, 6 Hun., 353; *McCall vs. Sun Mut. Ins. Co.*, C. A., Sept., 1876; *Pindar vs. Resolute Ins. Co.*, 47 N. Y., 114; *Rohrback vs. Germania Ins. Co.*, 62 N. Y.; *Ripley vs. Ætna Ins. Co.*, 30 N. Y., 136; *Trustees vs. Br. Ins. Co.*, 19 N. Y., 305; *Sheldon vs. At. Fire Ins. Co.*, 26 N. Y., 460; *Wood vs. Pr. Ins. Co.*, 32 N. Y., 619; *Bohen vs. Williamsburg City Ins. Co.*, 35 N. Y., 131; *Bodine vs. Ins. Co.*, 51 N. Y., 117; *Ludwig vs. Ins. Co.*, 48 N. Y., 384, and cases cited; *Shearman vs. Ins. Co.*, 46 N. Y., 532; *Myers vs. Life Ins. Co.*, 27 Penn. St., 268; *Chase vs. Ham. Ins. Co.*, 20 N. Y., 52; considered and discussed.

Van Schaick vs. Niagara Ins. Co., N. Y. C. A., 68 N. Y., 434.

19. The policy was not delivered nor the premium paid to the agent for some time subsequent to its issue; in the meantime the building was vacated and remained so. There was evidence tending to show that the agent was the general agent authorized to issue and deliver policies, and renew and cancel them, and he was supplied with blanks for proof of loss. *Held*, that if at the time the agent received the premium and delivered the policy, he had knowledge of the vacation of the property and still treated the insurance as valid, it was a waiver of the condition that it should be void if the building was vacated without immediate notice and written consent.

May on Ins., 611, 618, 622; *Coursin vs. Penn. Ins. Co.*, 46 Penn. St., 323; *Peoria M. & F. Ins. Co. vs. Hall*, 12 Mich., 203; *Heaton vs. Manhattan F. Ins. Co.*, 7 R. I., 502; *Viele vs. Germania Ins. Co.*, 26 Iowa, 9.

Where the assured was prevented by the acts or declaration of

the agent from furnishing proofs of loss within thirty days, as required by the policy, the conduct of the agent was a waiver of the requirement.

Home Ins. Co. vs. Cohen, 20 Gratt., 312.

Georgia Home Ins. Co. vs. Kinnier, Va. S. C. A., 6 Ins. Law Jour., 497.

20. The power executed by the company to M., constituted him "agent or surveyor." *Held*, that there was nothing in the term surveyor to limit the power of M. as agent, which in the absence of other evidence, would be assumed as general. *Held*, that a mutual company is bound, as any other, by the acts of its agent, as to those dealing with it. *Held*, that a member may not allege fraud in bar of payment of assessments, after enjoying the benefits of insurance for an unreasonable length of time.

Lycoming Fire Ins. Co. vs. Woodward, etc., Pa. S. C., 83 Pa., 223; 6 Ins. Law Jour., 398.

21. The plaintiff, an illiterate woman, applied to an insurance agent for a policy of insurance, and at the same time informed him that the lot was not paid for. On paying the charges she received her policy from the company in the usual form, with fine print conditions which were not read to her, and there was no evidence that she could read the conditions. The policy provided that the interest of the insured, if other than the entire and sole ownership, etc., must be represented to the company, and expressed in the policy, or it should be void; also that the agent should be deemed to be the agent of the insured; also that the policy was accepted in reference to its provisions, which were part of the contract and should be resorted to, to determine the right of the parties. *Held*, that the company having taken her money with full knowledge of her title, without objection to its validity, cannot take advantage of any technical points in the policy to avoid liability.

Allemania F. Ins. Co. vs. McClure, Pa. S. C., 7 Ins. Law Jour., 182.

22. Where an agent of an insurance company, acting within the general scope of the business intrusted to him as such agent,

fills up in his own language an application for insurance from the statements of the insured fully and truthfully made, receives the premium and issues a policy duly executed by the insurer on such application, the insurer will not be permitted, when a loss happens, to defeat the policy by denying the truth of the application, nor the authority of the agent in the transaction, although he has transcended his authority, unless the insured is chargeable with knowledge of his having exceeded his authority.

Flanders on Fire Ins., 174, 190; Beardsley vs. Foot, 14 Ohio St., 414; Douglass vs. Scott, 5 Ohio St., 197; Ætna Ins. Co. vs. Maguire, 51 Ill., 342; Malleable Iron Works vs. Phoenix Ins. Co., 25 Conn., 465; Lightbody vs. North America Ins. Co., 23 Wend., 18; Ins. Co. vs. Wilkinson, 13 Wal., 222; Mass. Life Ins. Co. vs. Eshelman, 30 Ohio St., 647; Plumb vs. Cattaraugus Ins. Co., 18 N. Y., 392; Rowley vs. Empire Ins. Co., 36 N. Y., 550; Combs vs. Hannibal Savings Ins. Co., 43 Mo., 148; Westchester Fire Ins. Co. vs. Earle, 33 Mich., 143; Franklin vs. Atlantic Ins. Co., 42 Mo., 457; Woodbury Savings Bank vs. Charter Oak Ins. Co., 31 Conn., 517; Comm. Ins. Co. vs. Ives, 56 Ill., 402; Carroll vs. Charter Oak Ins. Co., 40 Barb., 292; Pechner vs. Phoenix Ins. Co., 65 N. Y., 195; Gloucester Manuf. Co. vs. Howard Ins. Co., 5 Gray, 497; Ayres vs. Home Ins. Co., 21 Iowa, 185; Bartholomew vs. Mer. Ins. Co., 25 Iowa, 507; Kingston vs. Ætna Ins. Co., 42 Iowa, 46; Beal vs. Park Ins. Co., 16 Wis., 241; Mentz vs. Lancaster F. Ins. Co., 79 Penn., 475.

Union Ins. Co. vs. McGookey and Moore, O. S. C. C., 33 O., 555; 8 Ins. Law Jour., 417.

23. A general agent of an insurance company may waive the condition of the policy for a cash premium. His powers differ from those of partners. He may give credit for the premium. An insurance agent may keep an account current with his company, and he may therein charge himself with any or all premiums. In such case the agent may charge his personal creditor with the amount of his premium, and credit the company as against himself.

Stewart vs. Aberdeen, 4 M. & W., 211; Catterall vs. Hindle, L. R., 2 C. P., 368, 370; Chickering vs. Globe Ins. Co., 116 Mass., 521; Ins. Co. vs. Neland, 9 Bush., 430; Bouton vs. Ins. Co., 25 Conn., 542; Post vs. Ins. Co., 43 Barb., 351; Ins. Co. vs. Colt, 20 Wall., 560; Angell vs. Ins. Co., 59 N. Y., 171; Hoffman vs. Hancock Ins. Co., 92 U. S., 161.

Jones vs. Ætna Ins. Co. et al., U. S. C. C., Mass., 8 Ins. Law Jour., 415.

24. The insured applied to L., a recording agent of the company by which he was insured, for additional insurance. L.

referred him to K., who was a local agent with authority only to solicit applications and collect premiums. K. sent him to the agent of another company, who granted the insurance in that company, and afterwards informed K. of the fact, who made no objection. The policy in suit had been issued by K. & L. at that time in partnership as local agents, and provided that it should be void in case of other insurance without notice. It does not appear that the insured had knowledge of any limitation of K's authority beyond the fact that his original application had been forwarded to the home office and the policy had been forwarded to him from there. *Held*, that L. had authority to waive the policy provision. *Held*, that K., so far as concerned the insured, stood in the position of a general agent with power also to waive the provision. *Held*, that the conduct of the agents, or either of them, amounted to a consent for additional insurance, which estopped the company from setting up the policy stipulation.

Amer. Ins. Co. vs. Gallatin & Kuettle, Wis. S. C., 48 Wis., 36; 9 Ins. Law Jour., 50.

25. Where the agent's authority as to taking risks and payment of premium is unquestioned, the insured has a right to rely on it as to waiver of payment. The insured was not bound to inquire whether the officer issuing the policy knew of the agreement made by the agent.

Continental Ins. Co. vs. Randolph, Ky. C. A., 10 Ins. Law Jour., 387.

26. Agents of foreign companies who make contracts on behalf of the companies may waive conditions contained in the policies; it is within the apparent scope of their authority and binding on the company unless the insured is informed of their limitations. Such an agent may dispense with a condition requiring the consent of the company to be endorsed in case of non-occupancy, by acts amounting to a waiver, as he may endorse such consent. But mere knowledge of the agent and his failure to cancel the policy or inform the company does not amount to a waiver.

Wood on F. Ins., Sec. 89, Chap. 2.

Davey vs. Glens Falls Ins. Co., U. S. C. C., Minn., 9 Ins. Law Jour., 497.

27. After a loss a company should not be permitted to shield itself behind an unauthorized act of the agent, unless the insured knew the extent of his authority.

Ætna Ins. Co. vs. McGuire, 51 Ill., 342.

Where such knowledge does not appear, a refusal to admit evidence showing that the agent was prohibited from insuring beyond a certain amount in one warehouse is not an error.

Hartford F. Ins. Co. vs. Farrish, Ill. S. C., 7 *Ins. Law Jour.*, 46.

28. Sending an agent to adjust loss, estops an insurance company from denying proper notice of the loss; and, in the absence of fraud, it is bound by such adjustment.

F. & M. Ins. Co. vs. Chestnut, 50 Ill., 112; *Ins. Co. of N. A. et al. vs. McDowell et al.*, Id., 120; *I. M. F. Ins. Co. vs. Archdeacon et al.*, 82 Id., 236.

Insurance companies may, at their option, give authority to their agents to waive forfeitures, etc., even contrary to the declarations of their usual forms of policy, and such authority may be proved by parol.

Mann, Receiver, vs. Meyer, Ill. S. C., 8 *Ins. Law Jour.*, 905.

29. The agent who issued the policy in suit was forbidden by his commission to insure property outside of a defined district, not including the city in which plaintiff's property was situate; but plaintiffs neither knew nor inquired into the local limits of the agent's authority. The issue of the policy was promptly reported to the company; after the loss plaintiffs sent notice thereof to the general office, and subsequently furnished the formal proofs, and submitted to an examination touching the loss by the insurer's general State agent, and the company did not object to receiving the proofs or offer to return the premium; nor did it in any way object that the policy was issued without authority until after action brought. *Held*, that it is estopped from denying the agent's authority. The person who issued the policy must also be deemed an agent of the company for that purpose, under section 1977, Rev. St. of Wis.

Bigelow on Estoppels, 578; *Webster vs. Ins. Co.*, 36 Wis., 67; *N. W. M. L. Ins. Co. vs. Germania F. Ins. Co.*, 40 Wis., 446; *Schoener vs. Hekla Ins. Co.*, 3 Wis., 256.

Knox et al. vs. Lycoming F. Ins. Co., Wis. S. C., 10 *Ins. Law Jour.*, 89.

30. In an action against an insurance company upon a policy issued on an application taken by an agent, an instruction reciting that "if his agency was limited, and plaintiff knew that fact, then he could only bind the company to the extent of his powers," is erroneous, the real question being respecting the extent of the agent's authority and not the plaintiff's knowledge of it.

Dickinson vs. Miss. Valley Ins. Co., Iowa S. C., 41 Iowa, 286.

31. Where agent of company omitted to give in policy on stock of general merchandise, permission for keeping of kerosene oil and powder, parol evidence is admissible to show agent's knowledge of such keeping.

Mobile F. Dept. Ins. Co. vs. Miller, Ga. S. C., 58 Ga., 420.

32. Where a canvassing agent of an insurance company is fully informed of a prior insurance on the same property, but prepares the application so as to make it show there is no other insurance, which application the insured signs, and a policy is issued thereon, the company will be estopped from showing, in defense to an action on the policy, the prior insurance.

Amer. Ins. Co. vs. Luttrell, Ill. S. C., 89 Ill. R., 314.

33. Unintentional misrepresentations by the assured as to the value of the property, not relied upon in issuing a fire policy, do not vitiate it.

When the insurer's agent fills up the application for such a policy, knowing and having been properly informed by the applicant of facts demanded by questions therein touching title, incumbrances, value etc., mistakes in the application as to such facts are mistakes of the insurer, and do not avoid the policy.

If, when such a policy is renewed, the insurer's agent knows of any change that has taken place in the title, the renewal is a waiver of the conditions of the policy in relation to such change.

Mechler vs. Phœnix Ins. Co., Wis. S. C., 30 Wis., 665.

34. The rule that an agent cannot delegate his powers unless the sub-agency be directly authorized or ratified by his principal, with full knowledge of the facts, has no application to acts purely ministerial. In such cases, if he directs the act or, being aware of the circumstances, afterward adopt it as his own, that is sufficient.

Where a policy of insurance is signed by a sub-agent for the agent, and the latter afterward takes the policy, receives the premium, and, with full knowledge of the facts, redelivers the instrument, it thereby becomes the act of the company as much as though signed by the agent himself; and to prove that such authority is recognized in the sub-agent by the company, similar previous transactions may be shown in evidence.

Grady vs. Am. Cent. Ins. Co., Mo. S. C., 60 Mo., 116.

(b.) *Whether he acts for the company or the insured.*

35. Where the insured upon hearing of the loss applied to the insurer of the freight for instructions, and was directed to telegraph to his consignee to confer with the underwriters' agent at the place and to take at least a fifty per cent average bond, and the cargo was forwarded or disposed of under the direction of the agent, by his request. *Held*, that the agent acted as agent of the insurer.

Robertson vs. Atlantic Mut. Ins. Co., N. Y. C. A., 68 N. Y., 192; 6 Ins. Law Jour., 130.

36. The agent was authorized by the H. company to issue policies, to agree on risks and premiums, and was furnished with blank policies which, when countersigned by him, became binding. Application for insurance was made to the agent on the street, who agreed to issue a policy and extend the time of payment. Nothing was said about the particular company, which was left to the agent's discretion. The agent returned to his office, and filled up and delivered a policy in the H. company. *Held*, that the fact that no particular company was mentioned did not constitute him the agent of the insured; he acted for the company.

Story on agency, § 267.

The policy provided that the company should not be liable until actual payment of premium, and it was expressly covenanted that no officer, agent, or representative should be held to have waived any of the conditions unless the waiver were indorsed in writing on the policy. *Held*, that the parol agreement with the agent allowing credit on the premium was an authorized waiver of the policy conditions, and the fact that the agent

failed to indorse the waiver on the policy could not be set up to prevent a recovery, and such waiver might be shown by parol.

Miss. Valley Ins. Co. vs. Neyland, 9 Bush., 430; *Sheldon vs. Conn. Mut. Ins. Co.*, 25 Conn., 207; *Viele vs. Germania Ins. Co.*, 26 Iowa, 9; *Bœhm vs. Williamsburg Ins. Co.*, 35 N. Y., 131; *Trustees of Bapt. Ch. vs. Brooklyn Ins. Co.*, 19 N. Y., 305; *Bowman vs. Agric. Ins. Co.*, 59 N. Y., 521; *Westchester F. Ins. Co. vs. Ealle*, 33 Mich., 143; *Wright vs. Hartford F. Ins. Co.*, 36 Wis., 522.

Where the agents knew the condition of the title, and filled up the statements in the policy on their own responsibility, the company cannot allege that the title was not accurately described.

Higston vs. Ætna Ins. Co., 42 Iowa, 46.

Young vs. Hartford Fire Ins. Co., *Iowa S. C.*, 45 Iowa, 377; 6 *Ins. Law Jour.*, 543.

37. There was evidence of an agreement by which the insured surrendered his policy in the A. company to agent for cancellation, with authority to obtain insurance in a good company, the return premium to be credited in payment. The agent made application to the H. company, which was accepted, the policy containing the usual clause against other insurance. No specified rate was mentioned, and the premium was not paid either to the agent or the company. The agent knew the company's rates, and was accustomed to be charged for the premium, for which he gave credit to the insured. The agent was accustomed to take the surrender of policies in the A. company and cancel them. He neglected to cancel or return this policy to the company, and no return premium was paid. After the fire the A. policy was taken from the agent by the insured. *Held*, in an action against the H. company, that authority to apply to a good company was authority to apply to the H. company.

Ellis vs. Albany Fire Ins. Co., 50 N. Y., 402.

The application of the agent was that of the insured, and its acceptance completed the contract; the premium by being credited was constructively paid to the company. If there was an agreement between the agent and the insured, the surrender of the policy was a virtual cancellation which made the contract with the H. company valid. Whether the subsequent repossession of the policy by the insured was an assertion that it had not

been surrendered, or simply a precautionary act, was a question for the jury.

Excelsior Ins. Co. vs. Royal Ins. Co., 55 N. Y., 343.

Held, that the case was for the jury, under proper instructions, and a nonsuit by the court was error.

Train vs. Holland Purchase Ins. Co., N. Y. C. A., 62 N. Y., 578; 5 *Ins. Law Jour.*, 177.

38. The application was made through an agent authorized only to solicit applications and receive premiums, which were forwarded to the company, which either granted the insurance or returned the premiums. The agent was expected by the company to fill up the application, and did so in this case. The application stated there was no incumbrance, whereas the property was mortgaged. The policy, which was not received until some time after, provided that the application should be a warranty, and also that "any person acting as soliciting agent or surveyor, in filling out or making the application on which this insurance is based, is the agent of and acts for the insured, and not for this company under any circumstances or in any manner whatever." The policy made no provision for cancellation except by the company. *Held*, that parol evidence was admissible to show that the agent was correctly informed of the incumbrance.

Miller vs. Mut. Benefit Life Ins. Co., 31 Iowa, 266, and *Higston vs. Ætna Ins. Co.*, 42 id., 46, and authorities cited. *Rowley vs. Empire Ins. Co.*, 36 N. Y., 550. *Cases of Chase vs. Hamilton Ins. Co.*, 20 N. Y., 53; *Owens vs. Holland Purchase Ins. Co.*, 56 N. Y., 565; *Rohrback vs. Germania Ins. Co.*, 62 N. Y., 47; *Jenkins vs. Quincy F. Ins. Co.*, 7 Gray, 370; *Loehner vs. Home Mut. Ins. Co.*, 17 Mo., 246, distinguished and excepted to.

Held, that the company was bound by such knowledge of the agent. *Held*, that the claims of insured could only be saved by the facts having been correctly stated to the agent. *Held*, that in the absence of information to the contrary by the insured, the agent in taking the application was the agent of the company, and not of the insured. *Held*, that the insertion of the clause making the agent the agent of the insured, in a policy which continued to run and earn premiums some time before it came to the knowledge of insured, was a fraud upon the insured, for which he would have been entitled to repudiate the transaction

and recover the premiums. *Held*, that the insured was not bound to examine the policy as to whether it contained false statements of fact regarding a past transaction, as he might have been, had the making of the application and delivery of the policy been one transaction, and therefore was not bound by the clause making the agent the agent of the insured. The policy provided that in case of incumbrance the company should not insure or pay more than two-thirds of the amount of interest of the insured, which was to be the difference between the actual cash value of the property and the amount of incumbrance. *Held*, that the recovery must be limited to the amount so determined.

Boecher vs. Hawkeye Ins. Co., Iowa S. C., 47 Iowa 253; 7 Ins. Law Jour., 817.

39. The answers in the application which were made a part of the policy and a warranty were made by the agent. *Held*, that the fraud or mistake of an insurance agent, committed within the scope of the powers given him by the company, will not enable the latter to avoid a policy to the injury of the insured, who innocently became a party to the contract. When an agent of the assurer has cheated the assured into signing the warranty, and paying the premium, and the policy is issued upon the false statements of the agent himself, the assured may prove the fact, and hold the principal to the contract as if he had committed the wrong. As to all preliminary negotiations, the agent acts only on behalf of the company; and a company may not escape the consequences of the fraud or mistake of the agent by inserting a stipulation in the policy that such agent shall be deemed the agent of the insured, who, at the time of applying for the policy, was ignorant of the insurer's intention so to stipulate.

Columbia Ins. Co. vs. Cooper, 14 Wright, 331.

Eilenberger vs. Prot. Mut. F. Ins. Co., Pa. S. C., 89 Pa., 464; 8 Ins. Law Jour., 822.

40. Plaintiff signed a blank form of application, which was filled up by defendant's agent without any knowledge or dictation from plaintiff; there were false answers and statements therein occasioned by the carelessness, mistake or inadvertence of

the agent. The policy contained a clause that he who procured the insurance should be held by contract to be plaintiff's agent; also a condition that the application must be made out by defendant's authorized agent. *Held*, that there was no warranty binding upon plaintiff, and consequently no breach.

Sprague vs. Hol. Pur. Ins. Co., N. Y. C. A., 69 N. Y., 128.

41. The insurance was procured by the local agent authorized to take applications, collect premiums, give binding receipts for *ad interim* insurance, and who was furnished with blank applications to be filled up under his supervision. He was also instructed by the company to carefully study the instructions and blanks in order that he might be able to fill out the blanks rapidly, etc. On the back of the policy was printed the following among other conditions: "It is part of this contract that any person, other than the assured, who has procured this insurance to be taken by the company, shall be deemed to be the agent of the assured * * and not of this company, under any circumstances whatever, in any transaction relating to this insurance."

Held, that the condition was obscure and misleading in its verbiage, and the company could not, while holding out the agent as their trusted representative, make him the agent of the insured for the purpose of avoiding responsibility for his acts, by such stipulation; the condition involves a legal contradiction and is invalid.

Ins. Co. vs. Mahone, 21 Wallace, 156; Case of Rohrback, 62 N. Y., excepted to.

The agent participated in the preparation of the application, dictated the most material answers, and consented to all of them as true statements of the facts. *Held*, that the acts of the agent were the acts of the company, which was estopped from alleging the omission or misstatement of any facts in the application, and parol evidence is admissible to show such participation by the agent.

Rowley vs. Ins. Co., 36 N. Y., 550; Peck's case, 22 Cowan, 575; Beld's case, 25 Cowan, 51; Franklin's case, 42 Mo., 457; Deal's case, 16 Wis., 241; Malleable Iron Works vs. Ins. Co., 25 Conn., 460; Plummer's case, 18 N. Y., 392; Molure's case, 5 Rance, 342; Ayer's case, 21 Iowa; Carpenter's case, Am. Lead. Cases; May's case, 25 Wis., 306; Schallien's case, 38 Ill., 166; Wilkinson's case, 13 Wallace, 23; Ins. Co. vs. Mahone, 21 Wall., 152.

The strictly more appropriate remedy is by action in chancery for reformation of the contract, but the same end may be accomplished at law through the doctrine of equitable estoppel. A company may properly limit the power of its local agents, provided the fact is brought to the knowledge of the assured by a stipulation in the application, that they will not be bound by any statements not contained therein.

Chase vs. Ins. Co., 20 N. Y., 54.

Planters' Ins. Co. vs. Myers, *Miss. S. C.*, 55 *Miss.*, 47; 7 *Ins. Law Jour.*, 53.

42. The policy provided that it should be void in case the building became unoccupied without the consent of the company indorsed on it. Also, that nothing less than a distinct specific agreement, clearly expressed and indorsed on the policy, should be construed as a waiver of its terms. Also, that the agent has no authority to waive, modify, or strike from the policy any of its printed conditions; nor is his assent to an increase of risk binding until indorsed on the policy and the increased premium paid, nor has he power to revive the policy after it has become void through a breach of its conditions, and any new policy intended to replace one so made void, shall be of no effect until its actual issue and delivery, any parol contract with the agent notwithstanding. Also, that any person other than the insured procuring the insurance to be taken by the company shall be deemed the agent of the insured in all circumstances relating to the transaction. The agents who countersigned and issued the policy were notified that the building was vacant, but neglected to communicate the fact to the company. Proofs were made out under the agents' direction, which not being satisfactory, further proofs were required which contained a statement that the building was vacant. *Held*, that the agents were the agents of the company and not of the insured, and notice to them was notice to the company unless there was something in the contract which prevented it.

Miner vs. Ins. Co., 27 *Wis.*, 693; *Story on Agency*, §§ 140, 151.

Held, that the policy limitations of the agents' powers referred only to acts, not to the effect of a notice of a fact relating to the

policy. *Held*, that the company had constructive notice that the building was unoccupied when additional proofs were required, and was estopped by such requirement from declaring the policy void for a breach of its condition.

Webster vs. Ins. Co., 36 Wis., 67; *N. W. Mut. Life Ins. Co. vs. Germania Ins. Co.*, 40 id., 446.

Held, that the plaintiff was not prevented by the allegation in his complaint that all the conditions had been fulfilled, from showing in evidence facts which would estop the company from pleading a breach of condition where he could not know, until the answer was served, that such breach would be pleaded.

Waddle vs. Morrill, 26 Wis., 601; *Case of Gill vs. Rice*, 13 Wis., 549, distinguished.

Gans vs. St. Paul F. & M. Ins. Co., Wis. S. C., 43 Wis., 108; 7 *Ins. Law Jour.*, 303.

43. The renewal certificate was signed by the officers of the company, and provided that it should not be valid unless countersigned by the duly authorized agent. Previous to the renewal, the insured sold the premises, taking back a mortgage, which was stated to the agent who countersigned the renewal, who promised to make it all right. No mention of the fact, however, was made in the policy or the renewal. The policy provided that it should become void if the property were sold or the interest of the insured were not truly stated; also, that anything less than a specific agreement indorsed thereon should not be deemed a waiver. *Held*, that if the agent was the agent of the company, his parol consent was a waiver of the policy conditions.

Fish vs. Liverpool, London and Globe Ins. Co., 44 N. Y., 538; *Sherman vs. Niagara F. Ins. Co.*, 46 N. Y., 526; *Pechner vs. Phoenix Ins. Co.*, 65 N. Y., 195; *Van Schaick vs. Niagara F. Ins. Co.*, 68 N. Y., 434; *Bidwell vs. Northwest Ins. Co.*, 24 N. Y., 302.

The policy provided that any person other than the insured, who should procure the insurance, should be deemed the agent of the insured and not of the company. *Held*, that the agent could not be the agent of both parties. The provision requiring the policy and renewal to be countersigned by a duly authorized agent was antagonistic to the other, and rendered him the agent of the company, and not of the insured.

Sprague vs. Holland Purch. Ins. Co., 69 N. Y., 138. Cases distinguished of *Rohrbach vs. Germania F. Ins. Co.*, 62 N. Y., 47, and *Alexander vs. same defendant*, 66 N. Y., 464.

Whited vs. Germania F. Ins. Co., N. Y. C. A., 76 N. Y., 415; 8 *Ins. Law Jour.*, 368.

44. Parol evidence is admissible to show that the assured stated to the solicitor of the insurance company who received the application the fact that there was an incumbrance upon the property insured. Notice to a soliciting agent, who is authorized to fill up applications for the assured, to receive premiums and forward the same with the application to the company, and whose agency thereupon ceases, is notice to the company. A policy of insurance expressly stipulated that the soliciting agent who took the application was the agent of the assured; the latter was not advised of the fact at the time of the negotiation, when the application was signed and the premium paid; the policy further provided that the insurance might be terminated at the option of the company. *Held*, that the assured had the right to believe the soliciting agent was the agent of the company, and the insertion of the clause in the policy, providing that he was the agent of the assured, constituted a fraud upon the latter, of which the company could not take advantage.

Boetcher vs. Hawkeye Ins. Co., Iowa S. C., 8 *Ins. Law Jour.*, 705.

45. An agent authorized to issue policies of insurance may, after such a policy is issued, bind the insurer by an agreement that the assured may procure further insurance in other companies, contrary to the conditions of the policy. In pursuance of a custom among the insurance agents in a city, X., one of such agents, to whom an application for insurance had been made, (without specification of the companies in which it should be placed,) by agreement with Y., another of such agents, procured the risk to be taken in two companies of which Y. was, and X. was not, the authorized agent. X. delivered the policies, countersigned by Y., to the assured, and collected and delivered to Y. the premiums, which were divided between X. and Y. The assured did not know of anything that occurred between X. and

Y., or that X. was not authorized to act as agent of said two companies. X. knew when the application was made that the applicant intended to procure further insurance elsewhere, and after he delivered the two policies he assented to such further insurance, contrary to a condition in those policies, and without the knowledge of the companies or of Y. *Held*, that under section 1977, Rev. St., X. must be regarded as an agent "to all intents and purposes," of the two companies whose policies he delivered, and they are bound by his waiver of the condition against further assurance.

Miner vs. Ins. Co., 27 Wis., 693; *Roberts vs. Ins. Co.*, 41 Wis., 321; *Gans vs. Ins. Co.*, 43 Wis., 108; *Amer. Ins. Co. vs. Gallatin*, 48 Wis., 36.

The object of section 1977, Rev. St., is to change the rule of law that the insured must, at his peril, know whether the person with whom he is dealing as an agent has the power he assumes to exercise, and to make an insurance company responsible for the acts of the person who assumes to represent and act for it, in soliciting insurance, issuing policies, etc.

Schæner vs. Hekla F. Ins. Co., Wis. S. C., 10 Ins. Law Jour., 306.

46. The plaintiff's mortgagee applied to C., the agent of certain insurance companies, for a policy on his interest as mortgagee. Failing to procure the insurance in his own, the agent forwarded a memorandum to the agent of another company who had requested him to send risks, and a policy was issued through the mistake of C., insuring the mortgagor, loss payable to mortgagee. The mortgagor had not authorized such insurance, and afterwards procured a policy on his own account. The premium was paid by the mortgagee, who called the agent's attention to the form and was told that it was an insurance on his interest. *Held*, that under the statute of New Hampshire, C. was the agent of the company, and his knowledge of the facts and representations were the knowledge and representations of the company.

Union Trust Ins. Co. vs. Wilkinson, 13 Wall., 222; *Ins. Co. vs. Mahone*, 21 Wall., 152; *N. J. Life Ins. Co. vs. Baker*, 94 U. S., 610.

Held, that the plaintiff was entitled to have the policy reformed to cover his interest and to recover.

Oliver vs. Mutual Com. Ins. Co., 2 Curtis, C. C., 277; *Woodbury Savings*

Bank vs. Charter Oak Ins. Co., 31 Conn., 517 ; *Longhurst vs. Star Ins. Co.*, 19 Iowa, 364 ; *Snell vs. Ins. Co.*, 98 U. S., 85.

Sias vs. Roger Williams Ins. Co., U. S. C. C., N. H., 10 Ins. L. J., 500.

47. Where an applicant for insurance signed the application in blank, and the agent of the company, upon his own motion, and without authority or direction from the applicant, filled the blanks, it was *Held*, that he did not thereby become the agent of the applicant, rendering the latter responsible for any misstatements he may have made, and that his misstatements would not relieve the insurance company from its liability.

Kingston vs. Aetna Ins. Co., Iowa S. C., 42 Iowa R., 46.

48. When a policy of insurance does not state the facts of ownership, but the loss is made payable to a third party, such fact is notice to the company that such party has rights in the premises. Where one is employed to solicit insurance and claims to be the agent of a company, and takes a written application from the insured, which he takes to the company and gets a policy, and delivers it to the insured and gets the premium but does not pay it to the insurer, and the policy provides that any person soliciting the insurance is to be considered the agent of the applicant and not of the company, if either suffer loss it must be the one who gives him written indicia of acting as their agent, so in this case notice to such a solicitor that the premises were used in a different way than specified in the application and policy, cannot be held as notice to the company, and an instruction that would authorize the jury to so find is erroneous.

Farmers' Ins. Co. vs. Munn, App. Ct. of Ill., 1 Dist., 9 Ins. Law Jour., 159.

49. The policy contained a clause that the person procuring the insurance other than the insured should be deemed the agent of the insured and not of the company in all transactions relative to the business. The Brooklyn and New York agencies of the company were distinct and independent. A surveyor and solicitor employed by the Brooklyn agent procured the policy from the New York agency. The insured had not an intelligent knowledge of English, and upon the delivery of the policy de-

sired to draw his check for the premium payable to the president, and inquired his name of the solicitor. The latter gave his own name, and afterward failed to turn over the money to the company. In a suit against the insured for its recovery; *Held*, that if the solicitor was an agent of the company, payment to him was payment to the company. The question of his agency was a question of fact that should have been submitted to the jury.

Andes Ins. Co. vs. Loehr, N. Y. C. P., 4 Ins. Law Jour., 465.

50. The policy provided that any other person than the insured procuring the insurance, should be deemed the agent of insured and not of the company. *Held*, where the insurance was solicited by a street broker, who examined the property, bargained as to rates, procured and delivered the policy and took the premium part in cash and part in drinks, and the policy provided that it should not be valid until payment of premium, that the company was estopped to deny the agent's authority in the absence of knowledge by the insured, and evidence of the facts of the case was admissible.

Lycoming Ins. Co. vs. Ward, App. Court of Ill., 1 Dist.

WHEN THE COMPANY IS NOT BOUND BY.

(a.) *When he is the admitted agent of the company.*

51. Agents have an implied right to investigate concerning the incendiary origin of a loss, and the exercise of such a right is binding on the company. But agents acting simply in their general employment as adjusters have no right to commence criminal proceedings unless authorized by the companies, and the companies will not be bound by such act unless authorized or subsequently indorsed by them.

Norman vs. Ins. Co., U. S. C. C., S. D. Ill., 4 Ins. Law Jour., 827.

52. A local agent has no right to waive a policy condition requiring the insured to furnish proofs of loss within 20 days.

Van Allen vs. Farmers' Joint Stock Ins. Co., N. Y. C. A., 64 N. Y., 409; 5 Ins. Law Jour., 729.

53. Authority of an agent to receive proposals and countersign and deliver policies is not authority to adjust losses or waive stipulated proofs and bind the company. The mere fact that an agent assumes to do those acts does not establish his authority, nor make his acts binding upon the company, in the absence of any notice of want of authority to the insured.

Bush vs. Westchester Fire Ins. Co., N. Y. C. A., 63 N. Y., 531; 5 Ins. Law Jour., 257.

54. An agent authorized to solicit applications to be forwarded for approval to the company, and to collect premiums, is not authorized to bind the company by a verbal contract to insure. The insured is not justified in believing he had such authority from the fact that he had been told by the agent on a prior application that he was insured from that time, and a policy so insuring him was subsequently issued.

Morse vs. St. Paul F. & M. Ins. Co., Minn. S. C., 5 Ins. Law Jour., 409.

55. Mere knowledge of a local agent who has no authority to consent to an alienation will not avoid a forfeiture.

Home Ins. Co. vs. Lindsey, O. S. C., 5 Ins. Law Jour., 549.

56. In an action on an alleged oral contract for insurance with the local agent where no policy was issued, and where the company claimed that he was not authorized to take the class of risks in question, evidence of a bargain with the agent, without first showing that he had power to contract, was not admissible against the objection of the company. Evidence of a practice at other agencies to take such risks, and that the agent received policies signed in blank, that he solicited the risk and received the premium, was not evidence that he had power to bind the company, in the face of the fact that he was debarred by his commission and the policies, and was properly excluded. The fact that he was local agent could only imply authority to insure in the mode allowed by the charter, and to take such risks as the policies in common use by the company's agents would warrant.

Security Ins. Co. vs. Fay, 22 Mich., 467; Meister vs. the People, 31 Mich., 99; Mussey vs. Beecher, 3 Cush., 511; Markey vs. Mut. Ben. Life Ins. Co., 103 Mass., 78; Turner vs. Quincy Mut. F. Ins. Co., 109 Mass., 568; Mech. Bk. vs.

N. Y. & N. H. R. R. Co., 3 Ker., 632; *Adriance vs. Room*, 52 Barb., 399; *Risley vs. Ind. B. & W. R. R. Co.*, 1 Hun., 202; *De Grove vs. Metr. Ins. Co.*, 61 N.Y., 594; *Bush vs. Westchester F. Ins. Co.*, 63 N. Y., 531; *Swazey vs. Union Mfg. Co.*, Sup. Ct., Conn., Sept., 1875; *Kornemanu vs. Monaghan*, 24 Mich., 36; *Farmers' Ins. Co. vs. Taylor*, 73 Penn. St., 342.

Reynolds vs. Continental Ins. Co., Mich. S. C., 36 Mich., 181.

57. Evidence that the agent received applications, took risks, settled rates of premium, and issued policies for the company, does not show that he was the general agent authorized to waive the preliminary proofs required by the policy.

Eastern R. R. Co. vs. Relief Ins. Co., 105 Mass., 570, distinguished.

Harrison vs. City F. Ins. Co., 9 Allen, 231; *Tate vs. Citizens' Mutual Ins. Co.*, 13 Gray, 79; *Shawmut Sugar Refining Co. vs. People's Mutual F. Ins. Co.*, 12 Gray, 535.

Lohnes vs. Ins. Co. of North America, Mass. S. J. C., 121 Mass., 439; 6 *Ins. Law Jour.*, 472.

58. An insurance agent, authorized to collect and transmit premiums, but with no express authority to bind the company by contract, cannot by an agreement with the assured bind the company to any postponement of the payment of a premium note and thereby keep the policy in force in contravention of its provisions.

Hutchings vs. Munger, 41 N. Y., 155; *Kirk vs. Hiatt*, 2 Carter (Ind.), 322; *Coming vs. Strong*, 1 Ib., 329. Distinguishing *Flanders on Ins.*, 164, and case cited; *Walsh vs. Aetna Life Ins. Co.*, 30 Iowa, 133, and cases cited.

Critchett vs. American Ins. Co., Iowa S. C., 52 Iowa, 457; 9 *Ins. Law Jour.*, 594.

59. The policy provided that if the property became and remained vacant for more than fifteen days without notice to the company and consent indorsed on the policy, it should be void; also that no officer, agent, or representative shall be held to have waived any of its terms unless such waiver should be indorsed on it. The agent, authorized to issue and renew policies, was informed that the premises would be vacant, and gave oral consent, making a memorandum of same upon the register. There was evidence that he informed plaintiff that an indorsement was not necessary; also that the plaintiff was aware of the provisions of

the policy. The company was not informed of the vacancy until after the loss. *Held*, that the agent was not authorized to give consent in any other way than by indorsement in the manner prescribed, although the company itself might dispense with the condition by oral consent.

Trustees vs. Brooklyn F. Ins. Co., 19 N. Y., 305.

Held, that this was not a case in which the principal is bound because the act was within the apparent scope of the agent's authority; the oral consent was in excess of his known authority.

Cases of *Clark vs. Metropolitan Bank*, 3 Duer, 248; *Story on Agency*, §127; *Howard vs. Braithwaite*, 1 Ves. & B., 209; *Stainer vs. Lysere*, 3 Hill, 412; *Barnard vs. Wheeler*, 24 Me., 279, distinguished.

Held, that the condition was lawful, and one which the company had a right to insert, and was not waived by the unauthorized act of the agent. The case is unlike those which hold that conditions which enter into the validity of a policy at its inception may be waived by agents.

Cases of *Trustees, etc. vs. Brooklyn Fire Ins. Co.*, 19 N. Y., 305; *Sheldon vs. Atlantic Fire and Marine Ins. Co.*, 26 N. Y., 460; *Boehm vs. Williamsburg Ins. Co.*, 35 id., 132; *Bodine vs. Exchange Ins. Co.*, 51 id., 117; *Bowman vs. Agricultural Ins. Co.*, 59 id., 526; *Carroll vs. Charter Oak Ins. Co.*, 1 Abb. Ct. App. Dec., 316; *Van Schaick vs. Niagara Ins. Co.*, 6 Ins. Law Jour., 195, distinguished.

Walsh vs. Hartford Fire Ins. Co., N. Y. C. A., 73 N. Y., 5; 7 Ins. Law Jour., 423.

60. It was claimed that the agent had consented to a subsequent transfer of the insured property as security for a loan. *Held*, that evidence of a power conferred by other companies on their agents was inadmissible to show the authority of the agent, where it did not appear that the custom was so general that the company must be presumed to have known of it. It is doubtful whether such custom would bind the company in any event.

Bradford et al. vs. Homestead F. Ins. Co., Iowa S. C., 10 Ins. Law Jour., 141.

(b.) *Whether he acts for the company or the insured.*

61. The application was incorrectly filled by the agent from correct representations by the insured. But the policy made the

agent the agent of the insured, and not of the company under any circumstances. The truthfulness of the application was a warranty. *Held*, that the terms of the contract must be enforced, and the breach of warranty was not avoided by the knowledge or acts of agents.

Plumb vs. Catt. Ins. Co., 18 N. Y., 392, distinguished; *Chase vs. Ham. Ins. Co.*, 20 N. Y., 52; *Rowley vs. Empire Ins. Co.*, 36 N. Y., 550, excepted; *Owens vs. Holland Purch. Ins. Co.*, 56 N. Y., 565-76.

Robrback vs. Germania Fire Ins. Co., N. Y. C. A., 62 N. Y., 47; 4 *Ins. Law Jour.*, 737.

62. A clerk employed in the office of the agent by him, has no power to waive limitation clause, and language of such clerk importing a waiver is ineffectual against the company.

Stephens & Dow vs. Lycoming Ins. Co., U. S. C. C. Ill.

63. The suit was for recovery under a renewal, which the company alleged had been canceled, but of which the insured denied having received any notice. There was also a dispute whether any specific payment of premium had been made. There was an arrangement between the insured and the agent by which he was to be allowed a rebate out of the agent's commission, and time on the payment of his premiums. There was evidence that the agent was to look after his insurances, and was left the whole charge of the matter, including the care of the documents. *Held*, that a list of insurances furnished by the agent to the insured, including the insurance in dispute, was inadmissible as evidence of a recognition by the company of its validity; the agent, in managing the insurance, acted as the agent of the insured and not of the company. It may be questionable how far notice of cancellation to a principal is necessary where the agent of the company is the only person with whom it has acted in behalf of the insured; but notice to a broker, through whom alone the insured deals, is notice to the insured. *Held*, that if the agent, by arrangement with the insured, gave him a personal credit, and arranged the premiums out of his own moneys or credits with the company, notice of cancellation and a return of the premium to the agent was sufficient. A subsequent collection of premiums by the agent would not revive the policy. There must be clear

evidence of the agent's authority to rescind the act of the company, and clear proof of an understanding that that specific act was intended.

Hartford F. Ins. Co. vs. Reynolds, Mich. S. C., 36 Mich., 502; 7 Ins. Law Jour., 214.

64. There was evidence tending to show that the general agent of the company was also employed by the insured as an agent for the care of his property, and that pursuant to a request from the insured, he agreed to insure the property and adjust the premium out of a balance in his hands, and wrote the policy and mailed his report to the company a few hours before the fire. *Held*, that an agent may properly act for one party to a contract, although he is at the same time agent for other purposes of the other party. An agent merely for the care and custody of property may act as agent for an insurance company in issuing a policy of insurance on the property. The two capacities are not necessarily inconsistent.

Northrop vs. Germania F. Ins. Co., Wis. S. C., 48 Wis., 420; 7 Ins. Law Jour., 456.

65. A general agent cannot delegate his discretionary powers concerning a risk requiring judgment to a substitute. A circular of the general agent, stating that another was in partnership and would take charge of the local agency, which was forwarded to the home office, did not require that the company should repudiate any delegation of authority to act for them. A failure to respond was no acceptance of it as a proposal. Where a sub-agent issues a policy on a printed blank, and countersigns it W., agent, per K., the insured is put on inquiry as to his authority.

McClure vs. Miss. Valley Ins. Co., St. Louis, Mo., C. A., 1877.

66. An agent may not without consent of his principals grant an insurance in his own favor, and the same principle applies to a second insurance, though the prior policy had been granted with the express sanction of the company.

White vs. Lancashire Ins. Co., Ont. Ch. Court.

67. The agent of one company cannot reinsure one of its risks in another company for which he is agent without consent. An

agent representing antagonistic interests cannot so make a bargain by himself, and the second policy is void unless ratified by the company. Nor can evidence of similar acts previously done and acquiesced in, be admitted to prove consent.

Mercantile Mut. Ins. Co. vs. Hope Ins. Co., St. Louis, Mo., C. A.

GENERALLY.

68. Where the agent, to preserve his business, canceled the policies he had issued of an insolvent company and reinsured them or returned the premiums after notice to return them to the home office for cancellation; *Held*, that he had no authority to cancel, but the insured might transfer to him by parol their claims against the company or the fund deposited by it for their security.

U. S. F. & M. Ins. Co. vs. Tardy, Ala. S. C., 2 Ins. Law Jour., 672.

69. An agent and his surety bound themselves, their heirs, executors, and administrators, jointly and severally; the condition being that the agent should promptly pay his balances, "during the time he should officiate as agent." *Held*, that the heirs and legal representatives of the surety were bound for deficiencies in the agent's accounts, occurring during his agency and after the death of the bondsman.

Gordon vs. Calvert, 4 Russ., 581.

Royal Ins. Co. vs. Davies, Iowa S. C., 4 Ins. Law Jour., 865.

70. Where the agent for several months failed at the end of each month to pay over the sums collected; *Held*, that in the absence of any stipulation to that effect the company was not obliged to notify the surety at the expiration of any portion of the time of such failures, but might recover the whole sum.

Hartford Fire Ins. Co. vs. Moss, Tenn. S. C., 5 Ins. Law Jour., 824.

71. Where the agent has accounted to the company for the premium, the company is not concerned with the fact that the agent delivered the policy without receiving the premium, and had no authority to give credit.

Agricultural Ins. Co. vs. Montague, Mich. S. C., 38 Mich., 548, 7 Ins. Law Jour., 708.

72. The law will not recognize an agreement between the members of an unincorporated partnership authorizing their agent to sue on their behalf. Where the agent of an underwriters' association signs the policy for the membership, he cannot maintain the suit in his own name for any sum due the association thereon. The engagement being on behalf of his principals, he is not liable to the assured, and there is therefore no consideration from him to sustain the contract.

Evans vs. Hooper, Eng. C. A., 5 Ins. Law Jour., 637.

73. The Missouri insurance law provides that when the superintendent of the insurance department shall become satisfied that the affairs of any company "are in an unsound condition, he shall revoke the certificate of authority granted to such company (to do business in this State), and shall cause a notice of such revocation to be published * * for at least four weeks; * * and the agents of such company are, after such revocation and notice, required to discontinue the issuing of new policies or the collection of any premiums." Wag. Stat., p. 772, § 32. An agent of an insurance company, in ignorance of the fact that his company's certificate had been revoked, and in less than four weeks after the revocation, issued a policy in the company and collected the premium, which he immediately sent to the company. In an action by the policy holder against the agent to recover the amount of the premium; *Held*, that the agent was liable, the revocation of the certificate being the material fact.

McCutcheon vs. Rivers, Mo. S. C., 8 Ins. Law Jour., 443.

74. Parol evidence is admissible to prove that an agent, whose duty it was to take down answers to questions in the application for a policy of insurance, and to certify to the company the correctness of the answers, which by the terms of the policy

were warranties, had either negligently or intentionally written an erroneous or ambiguous answer.

Eilenberger vs. Prot. Mut. F. Ins. Co., 8 Insurance Law Journal, 373.

Smith vs. Farmers & Mech. Mut. F. Ins. Co., Pa. S. C., 89 Pa., 287 ; 8 Ins. Law Jour., 828.

75. Where it appears from the correspondence, acts and a printed circular of a general agent that he acquiesced in the company's decision to terminate his agency at the end of the calendar year, he cannot, afterwards, set up a claim for salary for the balance of the time unexpired under his original contract.

Southmayd vs. Watertown F. Ins. Co., Wis. S. C., 8 Ins. Law Jour., 914.

76. The surety on an agent's bond, conditioned on the delivery by the latter to the company of all the property belonging to it which should come into his hands as agent, is liable for premiums subsequently received on old business, but not for moneys which such agent actually had in hand but had not delivered over at the time of execution.

Ball vs. Watertown F. Ins. Co., Mich. S. C., 9 Ins. Law Jour., 662.

77. Admissions of an agent during his agency, concerning business of his agency, are competent evidence against his surety.

Agricultural Ins. Co. vs. Hutzler, St. Louis, Mo., C. A.

78. The insurance was solicited by T., who sent the written application to a broker who procured the policy payable to another party. Upon receipt of the policy from T. he was paid the premium ; but there was no evidence that he forwarded it to the broker. *Held*, that the giving of the application to T., clothed him with indicia of authority to act for insured, and if he was the agent of neither party, that one should be held responsible who first enabled him to impose on the other. *Held*, that the policy being payable to a third party, was notice to the company of some interest in such party.

Farm. Ins. Co. vs. Mann, Ill. App. Court.

See Cross Index at end of volume, for other cases bearing on AGENT.

ALIENATION.

ABSTRACT OF THE LAW.

a. An absolute transfer of all title or interest in the subject of insurance is an alienation which will work a forfeiture, whether so stipulated or not.

Etna Ins. Co. vs. Tyler, 16 Wend. (N. Y.), 385; *McLaren vs. Ins. Co.*, 5 N. Y., 151; *Loring vs. Ins. Co.*, 8 Gray, 28.

b. A change of title which does not terminate the insurable interest is not usually an alienation.

Hitchcock vs. Ins. Co., 26 N. Y., 69.

c. A temporary alienation, with retransfer before the loss, will not avoid the policy.

Hooper vs. Hudson River Ins. Co., 17 N. Y., 429.

d. A mere agreement to sell is not alienation.

Trumbull vs. Ins. Co., 12 Ohio, 305; *Davis vs. Ins. Co.*, 10 Allen (Mass.), 113; *Perry Ins. Co. vs. Stewart*, 19 Penn St., 45.

e. A mortgage is no alienation.

Conover vs. Ins. Co., 3 Denio (N. Y.), 254; *Smith vs. Ins. Co.*, 50 Me., 96; *Rollins vs. Ins. Co.*, 5 Fost. (N. H.), 200; *Jackson vs. Ins. Co.*, 23 Pick. (Mass.), 418.

f. But the foreclosure of a mortgage is alienation when absolute.

Strong vs. Ins. Co., 10 Pick. (Mass.), 40; *Folsom vs. Ins. Co.*, 10 Fost., 231; *Ayres vs. Ins. Co.*, 17 Iowa, 180.

g. A mortgage, however, is an alienation of ownership, within the policy.

Edwards vs. Ins. Co., 1 Allen, 311; *Hutchins vs. Ins. Co.*, 11 Ohio St., 477.

h. A conditional sale is no alienation.

Hodges vs. Ins. Co., 4 Seld. (N. Y.), 416.

i. A mortgage is an alienation in part.

Abbott vs. Ins. Co., 30 Me., 414.

j. Alienation by mortgagor avoids insurance payable to mortgagee.

Loring vs. Ins. Co., 8 Gray, 28.

k. A conveyance and simultaneous reconveyance is not an alienation within the policy.

Page vs. Foster, 7 N. H., 392; *Stetson vs. Ins. Co.*, 4 Mass., 330.

l. A levy and execution, the right of redemption remaining in the insured, is not an alienation.

Clark vs. Ins. Co., 6 Cush., 342; *Phoenix Ins. Co. vs. Lawrence*, 4 Met. (Ky.), 9.

m. A lease is not alienation.

Lane vs. Ins. Co., 12 Me., 44; *West Branch Ins. Co. vs. Helvenstein*, 40 Penn. St., 289.

n. The sale and replacement of shifting stock by a merchant is not alienation.

Wolfe vs. Ins. Co., 39 N. Y., 49.

o. A mortgage of chattels with transfer of possession, since it passes title, is an alienation.

Rice vs. Tower, 1 Gray, 426; *Phoenix Ins. Co. vs. Lawrence*, *supra*.

p. Whether alienation of part avoids the whole, authorities are in conflict. The question usually turns upon the entire or divisible character of the contract.

Gould vs. Ins. Co., 47 Me., 403; *Fire Ass. vs. Williamson*, 26 Penn. St., 196; *Phoenix Ins. Co. vs. Lawrence*, 4 Met., 9; *Lochner vs. Home Ins. Co.*, 17 Mo., 247.

q. When a new contract subsists with mortgagee, alienation by mortgagor after assignment to mortgagee with consent of insurers, is not within the policy.

Bragg vs. Ins. Co., 5 Fost. (N. H.), 289; *Fogg vs. Ins. Co.*, 10 Cush. (Mass.), 337.

r. Whether transfer of title from one joint owner or partner to another, or even to a third party, is an alienation, the authorities are at variance.

Hoffman vs. Aetna Ins. Co., 32 N. Y., 405; *Pierce vs. Ins. Co.*, 50 N. H., 297; *Wilson vs. Ins. Co.*, 16 Barb., 511; *Dix vs. Ins. Co.*, 22 Ill., 272; *Hartford Fire Ins. Co. vs. Ross*, 33 Ind., 179; *Keeler vs. Ins. Co.*, 16 Wis., 523; *Burnett vs. Ins. Co.*, 46 Ala., 11.

s. A change of title or interest which does not amount to an alienation, will avoid a policy when so stipulated.

McEwen vs. Western Ins. Co., 1 Mich. N. P., 118; *Home Mut. Ins. Co. vs. Hauslein*, 60 Ill., 521.

See further on this subject under INCUMBRANCE, INSURABLE INTEREST, MORTGAGE, TITLE.

DIGEST OF RECENT CASES.

ALIENATION—WHAT IS, WITHIN THE MEANING OF THE POLICY.

1. A prohibition of sale without consent in the policy is violated by the sale of his interest by one partner to another.

Portsmouth Ins. Co. vs. Brinckley's Adm'r., Va. C. A., 2 *Ins. Law Jour.*, 842.

2. The policy provided that its assignment, or a transfer of the property without the consent of the company indorsed thereon, should immediately terminate the company's liability and void the policy; also that nothing less than a specific agreement indorsed on the policy should be construed as a waiver of its conditions. *Held*, that the policy was void instantly, and *ipso facto*, on transfer of the property.

Savage vs. Howard Ins. Co., 52 N. Y., 502; 2 *Ins. Law Jour.*, 769.

A by-law of the company provided that in the event of alienation, "the policy shall therefore be void, and be surrendered to

the officers of said company to be canceled, and a ratable proportion of the unearned premiums to be returned." *Held*, that this does not mean the insurance is to continue until the premiums have been returned, but only limits the obligation of the company to pay back the premium until the surrender of the policy. The consent of an unauthorized agent to an assignment of the policy does not affect the issue where there is no proof that such agent was notified of the transfer of title.

Buchanan vs. Westchester Co. Mutual Ins. Co., N. Y. Com. A., 4 Ins. Law Jour., 335.

3. Assumpsit on a policy of insurance against fire, issued in 1871. The policy provided, in accordance with defendants' charter and by-laws, that if the assured should aliene the property without giving defendant notice thereof in writing, the policy should be void; but if the alienation should be approved by defendant, the policy should be thereby confirmed. In 1872, H., the assured and owner of the premises, sold and conveyed the same to R. The deed contained the usual covenants, and provided that if R. should fail to pay H. \$1,500, with interest, as soon as he should dispose of the premises, or at all events within five years, the deed should become void, and that H. should retain the insurance as security, and should take well secured notes at not exceeding five years, or the time of the notes that R. might take when he should sell, in payment of said sum. H. then assigned the policy to R., and defendant approved the assignment, but H. retained the policy in accordance with the condition of said deed. In 1873, H. conveyed the premises by quit claim deed to the plaintiff, and H. and R. assigned the policy to him to be held as collateral security for the performance of said condition, and defendant approved of the assignment. Afterward R. sold and conveyed the premises and assigned his interest in the policy to A. and D., and defendant approved thereof. A. and D. sold and conveyed to P., who conveyed to J. H., who conveyed to M., after which the buildings were burned. Of the conveyance to P., and the conveyances subsequent thereto, so far as appeared, the defendant did not have the required notice. *Held*, that the deed to R. gave him a defeasible title, in legal

effect, such as he would have had if he had taken a deed in common form and executed a mortgage back; and that, therefore, the alienation from A. and D. to P., and the alienations subsequent thereto, avoided the policy not only as to the holders of the title thereby aliened, but also as to the plaintiff who was only collaterally interested.

The policy provided also that if the assured procured other insurance without consent of defendant, the policy should be void. M. procured other insurance without defendant's consent. *Held*, that under the circumstances of the case 9 V., the procurement of such further insurance would have avoided the policy, if it had not been already avoided by alienation of the premises.

Moulthrop vs. Farmers' Mutual Fire Ins. Co., Vt. S. C., 52 Vt., 123.

4. A building was insured against fire by a policy which provided that if the property should be sold, or if the policy should be assigned, without the consent of the company, "in every such case the risk shall cease and determine, and this policy be null and void." The building was conveyed, a mortgage given back for part of the purchase money, and the policy was assigned, with the consent of the company, to the grantee, who afterwards made an indorsement upon the policy by which it was to be payable, in case of loss, to the original insured "as his interest may appear." This was also assented to by the company. The grantee afterwards conveyed the building to another person without the consent of the company, and on its destruction by fire, made proof to the company, stating that this person was sole owner. *Held*, that the policy was avoided by the last mentioned conveyance, so that neither the plaintiff nor any other person could maintain an action thereon.

Smith vs. Union Ins. Co., Mass. S. J. C., 120 Mass., 90.

5. The policy insured C., loss if any payable to P., the mortgagee, and provided that it should be void, "if any change take place in title or possession, whether by legal process, or judicial decree, or voluntary transfer or conveyance." The insured was adjudged an involuntary bankrupt under the U. S. act of March

2d, 1867, passed prior to the date of the policy, and his property was assigned by the register to the assignee in bankruptcy. *Held*, that it was the intention of the parties to include involuntary as well as voluntary transfers. *Held*, that there was a change of title within the meaning of the policy clause, and P. could not recover.

Savage vs. Howard Ins. Co., 52 N. Y., 502 (2 Ins. Law Journal, 769); *Case of Starkweather vs. Cleaveland Ins. Co.*, 2 Abbott, U. S. Rep., p. 67, distinguished.

Perry vs. Lorillard Fire Ins. Co., N. Y. C. A., 4 Ins. L. J., 673.

6. Where the policy provided that the transfer of the insured premises, or a change in the title by voluntary transfer or conveyance, cuts off all right of recovery, a conveyance by the insured and wife to S., who reconveyed to the wife, operates to cut off such recovery, though made as a substitute for a will devising the property to the wife, and without the intention of divesting the insured of the entire title, who was to retain and did retain the same possession and control of the property. A subsequent notification by the wife to the secretary of the company of the conveyance for the purpose of having the policy changed if necessary, and his assurance that no change was necessary, did not preserve a right of action in case of loss to the insured, or confer it upon the wife in the absence of an assignment of the policy to her.

Langdon vs. Minn. Farmers' Mut. Fire Ins. Co., Minn. S. C., 22 Minn., 193.

7. The policy was payable to mortgagee. The property was afterwards conveyed to the mortgagee by deed absolute in form, containing no mention of the mortgage nor declaration of trust. The mortgagee claimed that he had orally agreed after sale of the property to account to the insured for the balance. *Held*, that there had been a sale within the meaning of the policy.

Falis vs. Conway Ins. Co., 7 Allen, 46; *Trull vs. Skinner*, 17 Pick., 213.

Dailey vs. Westchester F. Ins. Co., Mass. S. J. C., 10 Ins. L. J., 383.

8. The policy insuring the owner, loss payable to mortgagee as his interest might appear, provided that it should be void if any

change took place in the title or possession, whether by sale, transfer, or conveyance, legal process, or judicial decree. The mortgagor afterward conveyed his interest by quit-claim deed to the mortgagee, taking back a bond of reconveyance conditioned upon the payment of the amount due. The bond was not acknowledged or recorded, and the insurer was ignorant of the transaction. After the delivery of the bond the mortgagor continued to occupy a part of the building without payment of rent, paid taxes, made repairs, controlled the occupation of the other tenants, and until four months before the fire collected the rents and paid them over to the mortgagee. After that the mortgagee collected the rents, but had nothing more to do with the premises. The debt secured by the original mortgage had not been paid. *Held*, in an action to recover on the policy by the mortgagee, that there was an alienation within the meaning of the policy. The case is not affected by the statute declaring that an absolute conveyance shall not be defeated or affected by an unrecorded defeasance "as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice thereof."

General Statutes, ch. 89, sec. 15; *Hennessey vs. Andrews*, 6 Cush., 170; *Tomlinson vs. Monmouth Ins. Co.*, 47 Me., 232.

Foote vs. Hartford Fire Ins. Co., *Mass. S. J. C.*, 119 *Mass.*, 259.

9. The condition of the policy of insurance upon a dwelling-house was that it would be void if there was any sale, transfer, or change of title, without the consent of the insurer. The insured, without such consent, sold, and, by deed of general warranty, conveyed the land on which the property insured was situated, and, in part consideration therefor, took from the purchaser a bond, acknowledged under the deeds act, covenanting to permit the insured to use and occupy the dwelling house as his own during his natural life. *Held*, that this avoided the policy.

Ayres vs. Hartford Ins. Co., 17 Iowa, 176; *Springfield Ins. Co. vs. Brown*, 1 *Ins. Law Journal*, 57; *Avul vs. Hampton Ins. Co.*, 13 Gray, 431; *Springfield Ins. Co. vs. Allen*, 43 N. Y., 309; *Abbott vs. Hampden Ins. Co.*, 30 Maine, 414; *Home Mutual Ins. Co. vs. Houslein*, 60 Ill., 521; *Hoxie vs. Providence Mut. Ins. Co.*, 6 R. I., 517; *Bilson vs. Manuf'g Ins. Co.*, 7 A. L. R., 661; *Perry vs. Lorillard F. Ins. Co.*, 6 Lans., 201; *McIntire vs. Norwich F. Ins. Co.*, 102 *Mass.*,

230. Distinguishing *Hitchcock vs. N. W. Ins. Co.*, 26 N. Y., 68; *Savage vs. Howard Ins. Co.*, 52 N. Y., 502; *Byers vs. Ins. Co.*, 35 Ohio St., 606.

Farmers' Ins. Co. vs. Archer, Ohio S. C., 10 *Ins. Law Jour.*, 370.

10. The policy provided that it should be void if the property should be "sold or conveyed in whole or in part." The insured conveyed by warranty deed to D., who immediately, and as part of the same transaction, reconveyed to wife of insured. *Held*, that the insured having exchanged an absolute for a life estate, there was a conveyance of part within the meaning of the policy.

Edmands vs. Mutual Safety Ins. Co., 1 Allen, 311; *Orell vs. Hampden Ins. Co.*, 13 Gray, 433; *Loring vs. Manufacturers' Ins. Co.*, 8 Gray, 28; *Smith vs. Union Ins. Co.*, 120 Mass., 90; *Footé vs. Hartford Ins. Co.*, 119 Mass., 260; *Savage vs. Howard Ins. Co.*, 52 N. Y., 502; *Abbott vs. Hampden Ins. Co.*, 30 Me., 414. Distinguishing *Curry vs. Com. Ins. Co.*, 10 Pick., 535.

Oakes vs. Mfr's Ins. Co., Mass. S. J. C., 10 *Ins. Law Jour.*, 346.

11. A conveyance by the insured to his daughter, who subsequently conveyed to her mother, is a change of title which defeats the policy under a stipulation that any change in the title shall render it void. The result is not affected by the fact that the insured still had an insurable interest as occupant and tenant by courtesy; nor by the fact that no consideration was expressed in the deed where such consideration was afterwards inserted; nor by the fact that the conveyance was void as to creditors.

Prescott vs. Hayes, 43 N. H., 593; *Crafts vs. Union Ins. Co.*, 36 N. H., 44, 53; *Langden vs. Minn. Ins. Co.*, 22 Minn., 193; *Atherton vs. Phoenix Ins. Co.*, 109 Mass., 32; *Edmunds vs. Mut. Safety F. Ins. Co.*, 1 Allen, 311; *Barnes vs. Union Mut. Fire Ins. Co.*, 51 Me., 110.

The policy covered several distinct buildings for separate sums but for a gross premium. *Held*, that alienation which worked a forfeiture as to a part avoided the whole.

Citing and discussing *May on Ins.*, §§ 277, 278; *Clark vs. New Eng. Ins. Co.*, 6 Cush., 342; *Kimball vs. Howard Ins. Co.*, 8 Gray, 33; *Lee vs. Howard Ins. Co.*, 3 Gray, 583, 594; *Friesmith vs. Agawam Ins. Co.*, 10 Cush., 587; *Gould vs. York Co. Mut. Fire Ins. Co.*, 47 Me., 403; *Barnes vs. Union Mut. F. Ins. Co.*, 51 Me., 110; *Commercial Ins. Co. vs. Spankneble*, 52 Ill., 53, (4 Am. Rep., 582;) *Quarner vs. Peabody Ins. Co.*, 10 W. Va., 507, (27 Am. Rep., 582;)

Merrill vs. Agricultural Ins. Co., 73 N. Y., 452, (29 Am. Rep., 184;) Platt vs. Minn. Farm Mut. F. Ins. Co., 23 Minn., 479, (23 Am. Rep., 697.)

Baldwin vs. Hartford F. Ins. Co., N. H. S. C., 10 Ins. Law Jour., 433.

12. The policy provided that it should be void if alienated without consent of the company. Also that assignment of policy must be made within ten days after the sale of the property, and the policy forthwith sent to the office for the consent of the company, which would then be given. *Held*, that the stipulation to consent to an assignment only bound the company in case it had previously consented to an alienation. Where the property was alienated without such consent, and the policy afterward assigned and given to the local agent to forward to the company for its consent, but the property was burned before the policy had been received by the company, and its consent was not obtained; *Held*, that the company was not liable. Knowledge of the sale by a local agent who had not authority to consent for the company did not avoid the forfeiture.

Home Ins. Co. vs. Lindsey, O. S. C., 5 Ins. Law Jour., 549.

13. The policy insured \$2,500 on merchandise, with a provision that where the property or any part thereof "shall be alienated, or in case of any transfer or change of title to the property insured, or any part thereof, or of any interest therein," without the consent of the company, or if it should be levied upon or taken into custody on any legal process, or the title or possession be disputed in any legal or equitable proceeding, the policy should cease to be binding. *Held*, that the subsequent placing of a mortgage for \$882 without the knowledge of the company, avoided the policy.

Sossaman et al. vs. Pamlico Banking and Ins. Co., N. C. S. C., 78 N. C., 145; 7 Ins. Law Jour., 398.

14. The policy provided that it should be void if, without written consent first obtained, the "property shall be sold or conveyed, or the interest of the parties therein be changed in any manner, whether by act of the parties, or by operation of law; or the property shall become incumbered by mortgage, judgment, or otherwise." Through the death of the insured his

interest had passed, nearly two years previous to the loss, to his four brothers, under the devise in his will. Two of the brothers had died, and their interests had passed to their heirs or devisees. *Held*, that there was a change of interest which avoided the policy.

Cases of *Wyman vs. Wyman*, 26 N. Y., 253; *Burbank vs. Rockingham Mut. F. Ins. Co.*, 24 N. H., 550, distinguished; *Lappin vs. Charter Oak Ins. Co.*, 58 Barb., 325.

Sherwood, adm'r, vs. Agricultural Ins. Co., N. Y. C. A., 73 N. Y., 447.

15. Respondent held a policy of insurance given by appellant upon her dwelling-house and other property therein, containing the following clause: "If the property be sold or transferred, or any change take place in title or possession (except by reason of the death of the insured), whether by legal process or judicial decree, or voluntary transfer or conveyance, * * * this policy shall be void." *Held*, that the language is that of the insurer, for his own benefit, and must be construed most strongly against him.

Hoffmann vs. Utica Ins. Co., 32 N. Y., 405; *Westfall vs. Hudson Riv. Ins. Co.*, 2 Duer, 495; *Ins. Co. vs. Wright*, 1 Wall., 456; *West. Ins. Co. vs. Croppen*, 32 Pa. St., 351.

Held, that the policy was not avoided by a mortgage upon the property after the issuance of the policy. The foreclosure of such mortgage by advertisement and a sale of the mortgaged premises on such foreclosure, the period for redemption not having expired and no change having taken place in the possession, did not operate as "a sale, transfer, or change in title," within the meaning of the policy, so as to defeat a recovery for a loss accruing after the foreclosure sale, and before the expiration of the time of redemption.

S. F. & M. Ins. Co. vs. Allen, 43 N. Y., 389; *Burr. Law Dict.*, vol. 2, p. 986; *General Statutes*, p. 373, sec. 11: *id.*, p. 540, sec. 11; *Donnelly vs. Simonton*, 7 Minn., 167; *Horton vs. Miffit*, 14 Minn., 290-292.

Loy vs. Home Ins. Co., Minn. S. C., 24 Minn., 315.

16. The policy insured "the trustees of the convertible mortgage of the N. H., M. & W. R. R. Co." etc. It provided that "if the property be sold or transferred, or any change takes place

in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance," the policy should be void; also, that "when property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased," the insurance should terminate. The insurance was effected by plaintiffs, acting as trustees for the second mortgage bondholders then in possession and use of the property, the equity of redemption still existing. Subsequently the title of the owners and convertible bondholders was extinguished by foreclosure in the interest of the first mortgage bondholders, who took possession and appointed plaintiffs as their agents to operate the road. The foreclosure decree recognized an indebtedness of the road to plaintiffs for money advanced, which was made a lien to take precedence of the first mortgage. The property was subsequently conveyed to a new corporation, subject to this lien, and the agency of plaintiffs ceased. *Held*, that the foreclosure was a change of title and possession by judicial decree, which avoided the policy. *Held*, that the interest of plaintiffs as lienors was individual and wholly distinct from their interest as trustees, and was not insured under the policy. *Held*, that the nature of the trusteeship not being general, but specified as that of the convertible bondholders, parol evidence is not admissible to show that the plaintiffs insured their personal interest. Evidence was offered of a custom on the part of the agent to notify parties insured that a change of title would necessitate a transfer of the policy, and that the notice had been inadvertently omitted. The agent testified that he could not mention an instance of such notice during the period he had acted for the company. *Held*, that the evidence failed to establish a custom such as would control the policy.

Bishop et al. vs. Clay F. & M. Ins. Co., Ct. S. C. E.

17. The policy provided that it should be void if the property became alienated without consent. The insured was owner of a divided half of a mill, under agreement to discharge certain incumbrances, among them a mortgage given by his grantor. The mortgage was foreclosed and the property sold, June, 1876, subject to redemption within one year under the statute. In Sep-

tember, 1876, a proceeding was commenced to correct a misdescription of the property in the mortgage, and foreclosure proceedings, the insured being made a party. The decree was entered and the correction made in October, 1877. The property burned August, 1877. The insured made no claim under the subsequent proceedings, to any further right of redemption, based on the correction, and his not being included in the original proceedings. *Held*, that the insured's right of redemption expired with the year succeeding the original sale. *Held*, that the property was alienated within the meaning of the policy at the time of loss, and no recovery could be had.

Strong vs. Manufacturers' Ins. Co., 10 Pick., 40; *Clark vs. New England Ins. Co.*, 6 Cush., 342. Distinguishing *Provost vs. Rebmon*, 21 Iowa, 416.

McKissick vs. Mill Owners' Mut. F. Ins. Co., Iowa S. C., 50 Iowa, 116; 8 *Ins. Law Jour.*, 789.

18. Conditions in an insurance policy that any transfer or change of title to the property insured, or the assignment of policy without the consent of the insurance company indorsed on the policy, are not dispensed with or satisfied by notifying the company of the sale of the property and applying for consent of the assignment of the policy, although the company makes no reply to the application. It is not necessary under such circumstances that the insurer should make a formal forfeiture of the policy; the contract is at an end by the act of the assured, and mere silence on the part of the insurer will not be a waiver of the conditions.

Freely vs. Ins. Co., 6 Casey, 411; *Buckley vs. Garrett*, 11 Wr., 209; *Ferree vs. Ins. Co.*, 67 Penn. St., 373; *Carpenter vs. Ins. Co.*, 16 Pet., 496; *Trask vs. Ins. Co.*, 5 Casey, 198; *Desilver vs. Ins. Co.*, 2 Wr., 137.

Girard F. & M. Ins. Co. vs. Hebard, Pa. S. C., 10 *Ins. Law Jour.*, 425.

19. The property was conveyed by insured and wife to the daughter by a deed without consideration. Subsequently, but before recording, and without the knowledge of insured, a consideration was inserted, and a note for the amount executed by the daughter to the mother, who immediately handed it back. The insured did not object when afterwards informed of it.

Held, that the want of consideration originally, was cured by its subsequent insertion with plaintiff's assent, nor was it material that the conveyance was fraudulent as to creditors. There was a change of title which worked a forfeiture within the meaning of the policy stipulation that it should be void, "if the property be sold or transferred, or any change take place in title or possession, whether by legal process, voluntary transfer or conveyance."

Prescott vs. Hayes, 43 N. H., 593; *Crafts vs. Union M. F. Ins. Co.*, 36 N. H., 44, 53; *Langdon vs. Minn. Ins. Co.*, 22 Minn., 193.

The policy was indorsed payable to a mortgagee as his interest might appear. *Held*, that this was not an assignment, but merely an order as to payment. There was no contract between the mortgagee and company which could save his rights.

Loring vs. Manufacturers' Ins. Co., 8 Gray, 28; *Smith vs. Union Ins. Co.*, 120 Mass., 99; *Bates vs. Equitable Ins. Co.*, 10 Wall., 33; *Franklin Savings Institution vs. Central Ins. Co.*, 119 Mass., 240; *Brunswick Savings Institution vs. Commercial Union Ins. Co.*, 68 Me., 313; *Fitchburg Savings Bank vs. Amazon Ins. Co.*, 125 Mass., 431; *Grosvenor vs. Atlantic Ins. Co.*, 17 N. Y., 391.

There was no contract between the mortgagee and the company.

Blanchard vs. Atlantic M. F. Ins. Co., 33 N. H., 9; *Nevins vs. Rockingham M. F. Ins. Co.*, 25 N. H., 22, 28.

Baldwin vs. Phœnix Ins. Co., N. H. S. C., 10 *Ins. Law Jour.*, 32.

20. When the policy provides that there shall be no transfer or change of title or possession under penalty of forfeiture, it is avoided by the transfer of a partner to a stranger. The fact that no money was paid but simply a mortgage given, does not affect the case. An opinion by the agent that the claim was an honest one and the company would probably pay, would not waive a forfeiture for alienation.

Card vs. Phœnix Ins. Co., St. Louis, Mo., C. A.

WHAT IS NOT, WITHIN THE MEANING OF THE POLICY.

21. The policy required notice if the property were sold or aliened. *Held*, that a sale by order of Orphans' Court did not

require notice until confirmed, and notice by the vendor after the loss, but before confirmation, was sufficient.

Farmers' Mut. Ins. Co. vs. Forney, Pa. S. C., 2 Ins. L. J., 828.

22. A verbal agreement to sell, payment to be made by crediting on an existing debt, without any visible outward act in furtherance of the transaction, is not a change of title which avoids the policy.

Archer vs. Zeh, 5 Hill, 294; Schindler vs. Houston, 1 N. Y., 261; Mattice vs. Allen, 3 Abb., Ct. App. Dec., 248; S. C., 3 Keyes, 492; Clark vs. Tucker, 2 Sandf., 157; Ely vs. Ormsby, 12 Barb., 570; Walrath vs. Ritchie, 5 Laws., 362; Teed vs. Teed, 44 Barb., 96; Brabine vs. Hyde, 32 N. Y., 519.

Pitney vs. Glens Falls Ins. Co., N. Y. C. A., 65 N. Y., 6.

23. The policy provided that if the "property be sold or transferred, or any change takes place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance," it should be void. The insurance was in the name of the firm, the business being managed by two members, K. and C. An action for dissolution on the ground of insolvency was brought by K., who was appointed receiver under an interlocutory decree, with power to collect and pay the debts, and carry on the business until further order of the court. K. had perfected his appointment and taken possession as receiver, but the action for a dissolution had not proceeded to judgment at the time of the fire. *Held*, that the receiver acquired no title; it still remained in those in whom it was originally vested, *pendente lite*, and therefore there was no change of title.

Skip vs. Harwood, 2 Ark., 564; Greeley vs. Addraley, 1 Swanst., 573; Thomas vs. Bagstock, 4 Russ., 65; Bertrand vs. Davies, 31 Beavan, 436; Green vs. Bostwick, 1 Sand. Chy., 165; Swigerly vs. Fox, 75 Pa. St., 112; Kerr on Receivers, 158.

Held, that while there was a change in the technical character of the possession, there was no change in the actual custody of the property, and no apparent change in the risk; there was therefore no change of possession within the meaning of the policy.

Hoffman vs. Aetna Ins. Co., 32 N. Y., 405; Blateny vs. Dunham, 15 Beav., 40.

Keeney vs. Home Ins. Co. of Columbus, 7 Ins. L. J., 100.

24. An executory contract for a future transfer of the property is not such a legal transfer as is contemplated in a provision that where the property has been sold or delivered, or otherwise disposed of so that all interest or liability on the part of the insured has ceased, the policy should terminate.

Browning vs. Home Ins. Co. of Columbus, N. Y. C. A., 7 Ins. L. J., 428.

25. It was stipulated in a policy of fire insurance, that if the property insured should be sold or transferred, or any change made in its title without the assent of the company insuring, the policy should be void. The assured sold and conveyed the property for an agreed sum to be paid in the future, the company assenting to the sale, but without knowledge of its terms. To secure the payment of the purchase price, the purchaser, at the time of sale, and as a part of its terms, executed a mortgage of the property to the vendor, of which the company had no knowledge until after the property was destroyed by fire. *Held*, that the assent given by the company to said sale and transfer of title, was an assent to the terms upon which the same were made, and hence the execution of said mortgage did not avoid the policy.

Farmers' Ins. Co. vs. Ashton, O. S. C., 31 Ohio, 477.

26. A mere technical levy upon real estate under judicial process, unaccompanied by change of possession or increase of risk, will not avoid a policy of insurance containing a condition that the insurance "should cease from the time the property insured should be levied upon, or taken into possession or custody under any proceedings in law or in equity."

Ins. Co. vs. O'Maley & Wife, 1 Norris, 403.

Smith vs. Farmers & Mech. Mut. F. Ins. Co., Pa. S. C., 89 Pa., 287.

27. Where one mortgages chattels and insures the same, the loss to be paid to the mortgagees, and is afterward adjudicated a bankrupt on his petition, and under an order of the U. S. Court he assigns all his property to a trustee, such assignment does not avoid the policy where it contains a clause that "if any change takes place in the title or possession, whether by legal process or

judicial decree, said policy shall be void." It is the settled law of this State that the mortgagee of chattels has the legal title to the property mortgaged even before the debt is due, and he may take immediate possession of the property unless by express stipulations the mortgagor is permitted to retain possession.

Bragg vs. New England Mut. Life Ins. Co., 25 N. H., 289. Cases distinguished of *Adams vs. Rockingham M. F. Ins. Co.*, 29 Me., 292; *Young vs. Eagle F. Ins. Co.*, 14 Gray, 150; *Hazard vs. Franklin M. F. Ins. Co.*, 7 R. I., 429; *Perry vs. Lorillard F. Ins. Co.*, 61 N. Y., 214.

Appleton Iron Co. vs. British America Ins. Co., *Wis. S. C.*, 46 *Wis.*, 23.

28. A sale of the property insured, void because made by an agent who did not conform to the terms of his authority in making it, is no alienation, and does not vacate the policy of insurance thereon.

School District vs. Aetna Ins. Co., *Me. S. J. C.*, 92 *Maine*, 338.

29. A contract to sell is not a transfer of the property within the meaning of the policy.

Browning vs. Home Ins. Co. of Columbus, N. Y. C. P.

See Cross Index at end of volume, for other cases bearing on ALIENATION.

ALTERATION.

See POLICY, REPAIRS, RISK.

See Cross Index at end of volume, for cases bearing on ALTERATION.

ANSWERS.

See APPLICATION.

See Cross Index at end of volume, for cases bearing on ANSWERS.

APPLIANCES FOR EXTINGUISHING FIRES.

ABSTRACT OF THE LAW.

a. Appliances for the extinguishment of fires are usually in the nature of a continuing warranty which must be substantially complied with.

Garrett vs. Provincial Ins. Co., 20 U. C., Q. B., 200; *Aurora F. Ins. Co. vs. Eddy*, 49 Ill., 106.

b. The appliances must be in such condition as was contemplated in the contract, but a rigorous compliance will be excused where, from the peculiar circumstances of the risk, which must be presumed to be known by the insurers, it was impossible.

Gloucester Manufacturing Co. vs. Howard Ins. Co., 5 Gray (Mass.), 497; *Sayles vs. N. W. Ins. Co.*, 2 Curtis (U. S.), 610; *Aurora F. Ins. Co. vs. Eddy*, *supra*.

See further on this subject, under DESCRIPTION, RISK.

See Cross Index at end of volume, for cases bearing on APPLIANCES FOR EXTINGUISHING FIRES.

APPLICATION.

ABSTRACT OF THE LAW.

a. Statements in the application not material to the risk are mere representations and not warranties unless made so by the contract; but when made a part of the contract they become warranties and must be strictly complied with, whether material to the risk or not.

Marshal vs. Ins. Co., 27 N. H., 157; *Jefferson Ins. Co. vs. Cotheal*, 7 Wend., 72; *Cushman vs. Ins. Co.*, 4 Hun. (N. Y.), 783.

b. A mere reference to an application in the policy is not sufficient to make it part of the contract; it must either expressly or by implication be adopted.

Jennings vs. Ins. Co., 2 Den. (N. Y.), 75; *Denny vs. Ins. Co.*, 13 Gray (Mass.), 492; *Sheldon vs. Ins. Co.*, 22 Conn., 235; *Duncan vs. Ins. Co.*, 6 Wend., 488.

c. The application when distinctly referred to as the basis of insurance becomes part of the contract, and must be construed together with the policy,

and in case of variance the application will be treated as the real contract between the parties.

Delaware Ins. Co. vs. Cogan, 2 Wash. (U. S.), 4; Eagan vs. Ins. Co., 5 Den. (N. Y.), 326.

d. A reference in the policy to a part only of the application affects only the part so referred to.

Owens vs. Ins. Co., 56 N. Y., 565.

e. A stipulation in the application that it shall be a part of the policy does not make it so.

Owens vs. Ins. Co., 56 N. Y., 565.

f. A description of the risk in the application is a representation or warranty *in presenti*, but not necessarily *in futuro*.

Fowler vs. Aetna Ins. Co., 6 Cow., 673; Mead vs. N. W. Ins. Co., 7 N. Y., 530.

Knowledge of the facts by the insured is a waiver of misstatements in the application, though material.

Aurora Ins. Co. vs. Eddy, 55 Ill., 213; Andes Ins. Co. vs. Shipman, 77 Ill., 189; Keenan vs. Ins. Co., 12 Iowa, 126.

h. An application or survey subsequently executed, when not adopted by the insured, is not a part of the contract, though made so by its terms.

Newman vs. Springfield Ins. Co., 17 Minn., 123; Denny vs. Conway Ins. Co., 13 Gray (Mass.), 492.

i. The application attaches to renewals in so far as the same subject matter is covered.

Eddy Street Foundry vs. Baltimore Mut. Ins. Co., 5 R. I., 426.

j. An oral application, though referred to in the policy, does not become a warranty.

Liddle vs. Market Insurance Co., 29 N. Y., 184.

k. A statement in the application will be treated as a representation rather than a warranty when its character is doubtful.

Wilson vs. Conway Ins. Co., 4 R. I., 141.

l. Statements in the application not responsive to questions, and not called for by the questions or the policy, are representations, not warranties.

Hartford Protection Ins. Co. vs. Harmer, 2 Ohio St., 452.

m. When answers in application are vague or omitted, the acceptance of the application waives further information.

Dayton Ins. Co. vs. Kelly, 24 Ohio St., 345; Haley vs. Dorchester Mut. F. Ins. Co., 12 Gray (Mass.), 545.

n. Qualifications in the application by the insured will, in so far as relates to them, overrule a policy stipulation, that the application shall be a warranty.

Fitch vs. American Popular Life Ins. Co., 59 N. Y., 557.

See further on this subject, under AGENT, BROKER, CONTRACT, POLICY, REPRESENTATION, SLIP, SURVEY, WARRANTY.

DIGEST OF RECENT CASES.

APPLICATION—CONSTRUCTION OF.

1. An application when accepted does not itself constitute the binding contract between the parties exclusive of the policy. The application and acceptance constitutes an inchoate and executory contract, executed and completed by the policy.

Angel on Ins., § 22; May on Ins., § 44, 159, 168; Kohn vs. Ins. Co., 1 Wash., 93; McCulloch vs. Ins. Co., 1 Pick., 278; Perkins vs. Ins. Co., 4 Cowen, 645; Lightbody vs. Ins. Co., 23 Wend., 18; N. E. Ins. Co. vs. Robinson, 25 Ind., 536; Tayloe vs. Ins. Co., 9 Howard, 390; Ætna Ins. Co. vs. Iron Co., 21 Wis., 458; S. C., 26 Wis., 78; case of Falvey vs. Transportation Co., 15 Wis., 129, distinguished.

Fuller et al. vs. Madison Mut. Ins. Co., 36 Wis., 599.

2. In an action on a policy of insurance to recover for a loss by fire, the court charged the jury, *inter alia*: “But this paper, [the application,] is drawn up in lead pencil, and purports to contain the statements made by Bricker, and taken down by the agent at the time the policy was spoken of in the office. It is an application on its face, not to the City Insurance Company, but to the Fire Association of Philadelphia; that may have been a mistake, perhaps, but we mention that fact to bear us out in saying that the paper was not looked upon as a formal application, but simply taken as a memorandum.” *Held*, to have been error; that if the paper was but a memorandum drawn for the convenience of the agent of the company it was not reasonable that it should have been signed by the assured.

Myers vs. Vanderbilt, 3 Nor., 510.

City Ins. Co. vs. Bricker, Pa. S. C., 91 Pa., 488; 9 Ins. Law Jour., 784.

WHEN MISSTATEMENTS IN, AVOID THE POLICY.

3. An omission of some fact, though not specially inquired about, does not avoid a policy, unless that fact is a material one, and a failure to disclose would be fatal to the policy. But if the facts not disclosed are material, the policy is voided.

2 Bennett's Ins. Cases, 279; 5 Hill, N. J., 188; Flanders on Ins., 293.

Cheek et al. vs. Columbia Ins. Co. et al., Tenn. S. C., 4 Ins. Law Jour., 99.

4. If the application was signed by the agent of the insured, the burden of proof is on the insured to show that the answers are not theirs.

Murphrey & Co. vs. Old Dominion Ins. Co., U. S. C. C., N. C., 5 Ins. Law Jour., 297.

5. A policy of fire insurance contained, after the statement of the property insured, and the amount of insurance, the following clause: "Reference is had to application on file at this office, which is hereby made a part of this policy, and a warranty on the part of the assured." *Held*, that by force of this clause, the statements in the application, from representations antecedent to the contract, became stipulations forming part of it, and as such, to have any binding force, should, under the provisions of the St. of 1864, c. 196, have been set forth in the body of the policy. *Held*, also, that a subsequent clause in the policy, that the insurers were not liable "if the insured, in the written or verbal application for insurance makes any erroneous representation materially affecting the risk," did not vary the construction to be given to the contract as to the statements in the written application. A clause in a policy of fire insurance, that the insured shall, in case of loss, make affidavit stating "the whole value and ownership of the property insured," does not require the insured to make any statements with regard to incumbrances on the property.

Taylor vs. Aetna Ins. Co., Mass. S. J. C., 120 Mass., 254.

6. The policy provided that the application should be deemed a part of the policy, and a warranty. "And if any person insuring any building or goods in this office, shall make any misrepresentation or concealment, such insurance shall be void." Also, "in all cases of application for insurance in this company the applicant shall state the true value of the property, and also the amount of incumbrance, if any exist thereon." The insurance was effected through a broker. No written application was made or required. He merely presented the written forms adopted in policies in his own companies on the same property, and stated to the defendant's agent that he approved the risk. The existence of mortgages on the property was not stated in the written forms, nor mentioned to the agent. *Held*, that the presentation of the

written statement in the policies by the broker was an application by the insured. *Held*, that the non-disclosure of the existence of the incumbrances rendered the policy void, regardless of their materiality.

Bowman's Case, 4 Md. Rep., 620; *Balt. Fire Ins. Co. vs. Loney*, 20 Md. Rep., 20.

Held, that there was no ground in the construction of the policy, or in the facts, for applying the doctrine of estoppel as laid down in *Maryland Fire Ins. Co. vs. Gusdorf*.

Beck & Bolte vs. Hibernia Ins. Co., *Md. C. A.*, 6 *Ins. Law Jour.*, 272.

7. Instruction that when the application is part of the policy, the answers therein given concerning the non-existence of incumbrances were a warranty, and if the jury believed such an incumbrance existed the policy was avoided, unless the insurers had knowledge of the incumbrance, was correct and should have been given. Acceptance of assessments on a premium note, with knowledge of misstatements in the application, is a waiver of forfeiture, but if the note were given on another policy than the one in dispute, it would not be a waiver. Instructions that the existence of an incumbrance, under certain circumstances, was a breach of warranty, unless the defendant had done some act by which objection was waived, was erroneous, as the jury were left unrestricted to explore the field of inquiry, and that any act of the company might be construed as a waiver, regardless of the circumstances, whether with full knowledge or under a mistake of the facts.

Southern Mut. Ins. Co. vs. Yates, *Va. S. C. A.*, 6 *Ins. Law Jour.*, 625.

8. When diagram was part of the application, which was required to be true, an omission to state two buildings within 500 feet was a good defense; but a statement of a building being 190 feet instead of 178 feet was immaterial. A statement that there was one stove where there were two, avoided the policy.

O'Neil vs. Ottawa Agricultural Ins. Co., *Ont., Canada, C. P.*

9. When the insured was offered the opportunity to examine

the contents of the application which he signed, and was in no way misled by the agent, but neglected to do so, the company being ignorant of the facts, he is bound by misstatements regarding incumbrance in the application.

Dahlberg vs. St. Louis Mut. F. and M. Ins. Co., St. Louis, Mo., C. A.

WHEN MISSTATEMENTS IN, DO NOT AVOID THE POLICY.

10. A representation in the application in answer to a question concerning a force pump for putting out fire, that one was in process of construction, was simply an executory contract, and the policy could not be avoided for failure to put it in without notice to the insured.

Howell vs. Hartford F. Ins. Co., U. S. C. C., N. D. Ill., 3 Ins. Law Jour., 649.

11. The question was asked in the application: "How often is account of stock taken? When was it last, and what amount did it reach?" Answer: "Every three months; 1st of January, 1872—\$4,000." *Held*, that this was not a condition precedent, such as would work a forfeiture if account of stock was not taken at the end of every three months, but rather a stipulation whose neglect is to be compensated for by damages.

Wynne vs. Liverpool and London and Globe Ins. Co., N. C. S. C., 71 N. C., 121; 4 Ins. Law Jour., 348.

12. The application provided that "It is hereby declared that the above are true and fair answers to the foregoing questions, in which there are no misrepresentations or suppressions of known facts; and I acknowledge and agree that the above statement shall form the basis of the agreement with the Society." Some of the questions were of a character to which only problematical answers could be given. *Held*, that the application was not a warranty, but only a representation, which required good faith, and an absence of intentional misrepresentation or concealment in the answers, though they might not be strictly true in fact.

Ill. Masons' Society vs. Winthrop, Ill. S. C., 6 Ins. Law Jour., 809.

13. The policy provided that it was accepted on the condition, among others, that the applicant must state "the position, etc., of all contiguous buildings," and that the "survey, description, and representations shall be taken and deemed a part of the policy and a warranty." The policy, after stating the situation of the different buildings, adds, "As per application on file No. 1,234." The only application of that description was one on file at the office of the agent who had issued the policy, to whom it had been sent some time before, in connection with a policy issued by another company which this one suspended. *Held*, that the application was no part of the contract, and had no relation to it. A misstatement in the survey did not avoid the policy.

Clinton vs. Hope Ins. Co., 45 N. Y., 454.

Held, that the survey having been apparently made by an agent according to printed instructions, although purporting to have been by the insured, the avoidance of policy would be questionable even if the application were obligatory.

Vilas vs. N. Y. Cent. Ins. Co., *N. Y. C. A.*, 72 N. Y., 590; 7 *Ins. Law Jour.*, 440.

14. The application contained the following among other questions and answers: "What material is used for lubricating or oiling the bearings or machinery? A. Lard and sperm oil. Is the machinery regularly oiled? If so, by whom and how often? A. Yes, by engineer and miller as often as necessary." It appeared that during the life of the policy another oil was constantly used in the mill for lubricating purposes, and that the machinery was not usually oiled by the engineer or miller, but by another person specially employed by the plaintiffs for that purpose. The application, which was made a part of the policy and a warranty, contained the following stipulation: "And the said applicant hereby covenants and agrees to and with said company, that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant, and are material to the risk, and the same is hereby made a condition of the insurance and a warranty on the part of the assured." The policy provides

that the application "shall be considered a part of this policy and a warranty by the insured." *Held*, that the words "so far as the same are known to the applicant and are material to the risk," qualify the preceding clause and restrict the warranty to such statements as were material to the risk and known to be false, and these must be proved to sustain a non-suit. The burden of proof was on the company.

Houghton vs. Ins. Co., 8 Met., 114; *Blumer vs. Ins. Co.*, N. W. Rep., Sept. 11, 1878.

Redman vs. Hartford F. Ins. Co., Wis. S. C., 47 Wis., 89; 9 *Ins. Law Jour.*, 222.

15. Where a fire insurance policy is issued upon an application, which is made a warranty on the part of the assured, the omission to answer some of the printed questions in the application does not amount to concealment, and does not forfeit the policy. The issuing of a policy on an application which contains no answer to certain questions, is a waiver of answer to those questions, and to avoid the policy in such cases the insurers must prove untrue statements other than those inquired about and not answered.

May on Insurance, § 166, citing *Wilson vs. Hampden Fire Ins. Co.*, 4 R. I., 159; *Campbell vs. Ins. Co.*, 37 N. H., 35; *Liberty Hall Association vs. Housatonic Ins. Co.*, 7 Gray, 261; *Hall vs. Ins. Co.*, 6 Gray, 185.

American Ins. Co. vs. Paul and Wife, Pa. S. C., 9 *Ins. Law Jour.*, 569.

16. An applicant for fire insurance signed an application therefor, leaving unanswered interrogatories respecting title, encumbrances and value of the land, to which interrogatories untrue answers were subsequently written by the agent of the company, without the knowledge or consent of the insured. A policy was issued which contained the following clause: "If the interest of the insured in the property be any other than the entire, unconditional and sole ownership of the property, for the benefit of the insured, or if the same or any part thereof shall be incumbered by mortgage, judgment or otherwise, and be not stated to the company, and so expressed in the written portion of the policy, then, and in every such case, and in either of said events, this policy shall be null and void." The insured never read the

policy, and about two months after it was issued, the property covered by it was burned. *Held*, that the fraudulent act of the agent being within the apparent limits of his employment, although not within the actual authority conferred upon him, the company was liable therefor. That although the assured was not, because of the fraud, held to the warranties or representations in the application, he was bound by the terms of the policy, if after the lapse of a reasonable time he made no objection.

2 Pars. on Cont., 535, 661 and notes.

Swan vs. Watertown F. Ins. Co., Pa. S. C., 10 Ins. Law Jour., 392.

17. The issuing of a policy of insurance when a portion of the questions in the application remain unanswered, is a waiver of the answers to such questions.

Armenia Ins. Co. vs. Paul, Pa. S. C., 91 Penn., 520.

18. Where the agent who issues an insurance policy knows, at the time, of outstanding incumbrances upon the property, omitted from the statements of the application, such omission will not prevent a recovery.

Harriman et al. vs. Queen Ins. Co., Wis. S. C., 49 Wis., 71.

19. Though policy specify that application shall be considered a warranty and as part of contract, yet a misstatement in such application must, in some way, change the nature, extent, or character of risk, in order to avoid policy.

Mobile Fire Dept. Ins. Co. vs. Miller, Ga. S. C., 58 Ga., 420.

See Cross Index at end of volume, for other cases bearing on APPLICATION.

ARBITRATION.

ABSTRACT OF THE LAW.

a. No stipulation as to arbitration can oust the jurisdiction of the courts.

Scott vs. Phoenix Ass. Co., 1 L. C., 152 ; Gill vs. Hollis, 1 Wilson, 129.

b. But a stipulation to submit to arbitration as to matters not affecting the right to recovery, such as the amount or mode of settlement, is valid and operative.

Ins. Co. vs. Morse, 20 Ward (U. S.), 445; Stephenson vs. Piscataqua Ins. Co., 54 N. E., 55; Trott vs. Ins. Co., 1 Cliff., 439 ; Millandon vs. Ins. Co., 8 La., 557.

c. A stipulation, however, making the right of recovery itself subject to arbitration is void.

Elliot vs. Ins. Co., L. R., 2 Ex., 237.

d. A stipulation to submit to arbitrators whose award shall be binding, relates only to the adjustment of the loss.

e. Compliance with such stipulations is a condition precedent to a suit where the parties have so stipulated.

Robinson vs. Georges Ins. Co., 17 Me., 131; L. & L. & G. Ins. Co. vs. Creighton, 51 Ga., 95.

f. A denial of liability is a waiver of the right to arbitration.

Robinson vs. Ins. Co., supra.

g. Voluntary submission to arbitration as to special matters after a loss, is binding in the absence of fraud if the arbitration is fairly and properly conducted, but not otherwise.

Hamilton vs. Ins. Co., 106 Mass., 395; Skipper vs. Grant, 10 C. B. N. S., 237.

h. Submission to arbitration is a waiver of notice and proof of loss.

Dyer vs. Pisautqua Ins., 54 Me., 457.

See further on this subject, under ADJUSTMENT, POLICY.

DIGEST OF RECENT CASES.

ARBITRATION—WHEN IT IS BINDING OR OBLIGATORY.

1. The policy provided that in case of differences arising touching any loss or damage, the matter may, at the written request of either party, be submitted to impartial arbitrators, whose award in writing should be binding on the parties to the amount of such loss or damage, “but shall not decide the liability of the company under this policy;” also, “It is furthermore mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery until an award shall have been obtained fixing the amount of such claim in the manner herein above provided.” *Held*, that parties may not oust the jurisdiction of courts by agreement.

Huger on Ins., 351; Angell on Fire and Life Ins., sec. 345; Flanders on Fire Ins., 632; Thompson vs. Chamock, 37 R., 139; Mitchell vs. Harris, 2 Ves., jr., 136; Scott vs. Avery, E. S. & E. Rep., 327; S. C. on Appeal, 31 ib., 1; Roper vs. Sendon, 103 S. C. S. Rep., 325; Hagert vs. Mun, 40 R., 515; Snodgrass vs. Garret, 23 R., 224.

But whilst a mere collateral agreement to refer to arbitration

all differences arising upon a policy is not binding, and does not preclude a suit without such reference, it is not unlawful for parties to agree that no action shall be sustainable at law or equity until arbitration shall have determined what amount is due, and in such a case a reference and ascertainment of the amount due are conditions precedent to the right of bringing an action.

Smith vs. Railway, 36 N. H., 458; *Morsley vs. Wood*, 6 S. R., 710; *Milner vs. Field*, 1 E. S. & E. Rep., 531; *Grafton vs. Railway*, 22 ib., 577; *Davis vs. Mayer, etc.*, 2 ib., 529; *Adams vs. Willoughby*, 1 John., 67; *U. S. vs. Robeson*, 9 Pet., 319; *Scott vs. Avery*, 31 E. S. & E. Rep., 1.

Held, that the effect of these clauses was not to oust the jurisdiction, but only to make the fixing of an award a condition precedent. *Held*, that no suit could be sustained against the objection of the company until an award had been made, although neither party previously to the suit had requested arbitration.

Yeomans vs. Girard F. & M. Ins. Co., U. S. C. C., N. J., 5 *Ins. Law Jour.*, 858.

2. Where the insured consented to an arbitration through a statement by the agent made by mistake that the policy required it, and the insured could have corrected the error by examining the policy, he is bound by the arbitration.

Wheeler vs. Watertown F. Ins. Co., Mass. S. J. C., 10 *Ins. Law Jour.*, 354.

3. An agreement in a policy of insurance to refer the amount of loss to arbitrators on request, and that no action shall be brought until an award has been made, is a collateral agreement, and not a condition precedent to the bringing of a suit, and does not suspend the plaintiff's right of action.

Mentz vs. Armenia Ins. Co., 29 P. F. Smith, 478.

Where, however, both parties have submitted to an arbitration, and it is still pending at the time of verdict, the court may refuse to enter judgment upon the verdict until the award is filed, and then enter the amount so found due as the judgment of the court.

Schollenberger vs. Phoenix Ins. Co., U. S. C. C., Pa., 7 *Ins. Law Jour.*, 697.

4. The plaintiff brings his action to recover £200 from the defendants on a policy of insurance, of which condition 13 was as

follows:—"If any difference shall at any time arise between the company and the insured or any claimant under this policy as to the amount of any loss or damage by fire (and no fraud be alleged), every such difference as and when the same arises shall be referred to arbitration . . . and this condition shall be deemed and taken to be an agreement to refer as aforesaid, and it is thereby expressly stipulated and declared that the obtaining of such an award . . . shall be a condition precedent to the liability or obligation of the company to pay or satisfy any claim under this policy for loss or damage in respect of which any such difference may have arisen and to the enforcement of any such claim."

Held, that the condition in the policy meant that if the insurance company were liable, and did not dispute the amount claimed, they would pay it; that if the company were liable and did dispute the amount claimed, they would pay an amount to be ascertained by arbitration, but until that amount was ascertained there would be no liability on the part of the company.

Storey vs. Lond. & Lancash. F. Ins. Co., Eng. C. A., Feb. 1881.

WHEN IT IS NOT BINDING OR OBLIGATORY.

5. Where the act under which the company was organized provided that the loss claimant should immediately notify the president, who should forthwith convene the directors, who should appoint a committee of members to ascertain the amount of loss, and in case of inability to agree upon the amount of damages, the claimant might appeal to the court, which should appoint arbitrators with legal power to hear and determine the matter; *Held*, that the appointment of the committee was not a condition precedent to bringing an action, and a complaint is not defective because it fails to show that such proceedings were had.

Hughes vs. Vinland F. Ins. Co., Wis. S. C., 7 Ins. Law Jour., 331.

6. Under the Wisconsin law of 1874, that the amount of insurance written in a policy shall be conclusive as to the value of property, and the loss on an insurance policy is total, a suit in equity cannot be maintained to correct the award of arbitrators

acting under a stipulation in the policy, so as to reduce the amount of the damage for which the company is to be liable, below the amount of insurance stated in the policy.

Reilly and others vs. Franklin Ins. Co. of St. Louis, 43 Wis., 449; *Thompson and others vs. St. Louis Ins. Co.*, 43 Wis., 459; *Bammessel vs. Brewers' Ins. Co. of America*, 43 Wis., 463.

Thompson vs. Citizens' Ins. Co. of Mo. et al., Wis. S. C., 45 Wis., 388; 8 *Ins. Law Jour.*, 229.

7. An award made in the absence of the arbitrator chosen by one of the parties and without his consent, has no legal validity. Where two of the arbitrators had thus committed themselves to a decision upon an *ex parte* hearing, plaintiff may controvert the validity of an award made at a subsequent hearing without his consent.

Conrad vs. Massasoit Ins. Co., 4 Allen, 20; *Strong vs. Strong*, 9 Cush., 560.

Hills vs. Home Ins. Co., Mass. S. J. C., 9 *Ins. Law Jour.*, 814.

8. By a condition in a policy of insurance, in case of dispute touching the amount of the loss sustained, such dispute was to be submitted to arbitrators, one to be chosen by each party, with power to select a third in case of disagreement, their decision to be final; and no action, etc., should be maintained on the policy unless the loss, in case of such dispute, should have been first thus ascertained. *Held*, that this did not oust the jurisdiction of the courts.

Such condition is an agreement to refer to arbitrators to be chosen at a future time, and is revocable; the party may be subject to an action of damages for the revocation.

This condition being special is not without effect, but the company, to avail themselves of it, must show that they admitted the validity of the policy and their liability under it, and that the only question was the extent of the loss.

Parties may agree when the dispute is of the character of an account involving the examination of books, the value of a large number of things and the extent of the damage, that it shall be determined by men, as appraisers.

Mentz vs. Armenia Fire Ins. Co., Pa. S. C., 79 Penn., 478.

See Cross Index at end of volume, for other cases bearing on ARBITRATION.

ARSON.

ABSTRACT OF THE LAW.

a. The burning must be willful and calculated to at least injure the rights or property of another than the incendiary. At common law the property must be the dwelling of another, but statutes have greatly extended the nature of the property, to include other classes of buildings and materials of value. Proof of arson in a civil suit does not require that the guilt of the accused be established beyond a reasonable doubt. It is sufficient if there be a preponderance of evidence.

Huchberger vs. Ins. Co., 4 Bissell, 265; *Scott vs. Home Ins. Co.*, 1 Dill. C. C., 105; *Schmidt vs. Ins. Co.*, 1 Gray, 529.

DIGEST OF RECENT CASES.

ARSON—EVIDENCE RELATING TO.

1. In a civil suit on ground of fraud on account of arson, preponderance merely of evidence is necessary.

Howell vs. Hartford Fire Ins. Co., U. S. C. C., N. D. Ill., 3 Ins. L. J., 649.

2. It is usually sufficient, in a civil suit involving arson, to state what rules of evidence do apply. It is not necessary to charge the jury that the same strength and clearness of proof are not needed in a civil suit as in a criminal suit.

Bailey and Pond vs. London and Lancashire Ins. Co., U. S. C. C. La., 4 Ins. L. J., 503.

3. Arson, as a defense against civil action on a policy, is to be governed by the rule requiring only a preponderance of evidence.

Blaeser vs. Milwaukee M. & M. Ins. Co., Wis. S. C.

4. Where in a suit on a policy of insurance the defense is that the burning of the property was due to the act of the plaintiff, the issue is to be decided, as in other civil cases, according to the preponderance of evidence and the reasonable probability of its truth.

An instruction in a suit on a policy of insurance, where the defense was that the plaintiff caused the burning of the property insured, which would avoid the policy, stated that the issue was to be decided by the preponderance of evidence, the Court added thereto—"Regard being had, however, to the serious nature of the charge, in determining the preponderance or weight of evidence." *Held*, improper as injecting into the case an element of criminality, which it was the object of the instruction to eliminate, and as also being a commentary on the evidence, and, besides, the intent of the plaintiff in causing the burning of the property was not involved in the case.

Rothschild vs. Amer. Cent. Ins. Co., Mo. S. C., 62 Mo., 356.

5. On the trial of E., charged, under the Ohio act of March 20, 1860, with causing a building owned by him to be burned, with the intent to defraud the insurer of such building, H., called as a witness on behalf of the State, having testified that he burned the building in question, and that he was hired to do so by E., the court was requested, on behalf of the accused, to instruct the jury that H. was guilty of no crime if he burned the building at the instance of E., and was therefore interested in procuring the conviction of E. *Held*, that this instruction was properly refused. The criminal liability of H. for his participation in the transaction, whatever it was, was in no way affected by the result of the prosecution against E.

Evans vs. State of Ohio, Ohio S. C., 9 Ins. Law Jour., 204.

6. In an action on a policy of insurance against loss by fire, where the defense is that the property insured was willfully burned by the assured, the rule in civil, and not in criminal cases, as to the quantum of proof, applies, and a charge to the jury that the defendant is bound to establish the defense beyond a reasonable doubt, and by the same measure of proof that would be necessary to convict the plaintiff if he was on trial upon an indictment charging that offense, is erroneous. Such burning is not always and necessarily a criminal act.

Thurtell vs. Beaumont, 8 J. B. Moore, 612; 1 Bing, 339; 2 Greenl. Ev., § 418; 1 Taylor's Ev. (5th ed.), 97 a, disapproved; *Stephen on Ev.*, art. 94, p. 115; *Thompson vs. Hopper*, 6 E. & B., 172, 196; *Dudgeon vs. Pembroke*, Law Rep., 9 Q. B., 581; 1 Q. B. Div., 96; 2 App. Cas., 234; *Thompson vs. Hopper*

E. B. & E., 1038; Schmidt vs. N. Y. U. M. F. Ins. Co., 1 Gray, 529; 2 East Pl., 1027, § 7; 1034, § 11; State vs. Fish, 3 Dutcher, 323; State vs. Wyckoff, 2 Vroom, 65; 1 Phillips Ins., § 1046; 2. Whart, Ev., § 1246; 10 Am. Law Rev., 642; G. W. Railway Co. vs. Rimell, 18 C. B., 575; Metcalf vs. L. & B. & S. C. Railroad Co., 4 C. B. (N. S.), 307; Voughton vs. L. & N. W. Railroad Co., Law Rep., 9 Exch., 93; McQueen vs. G. W. Railroad Co., Law Rep., 10 Q. B., 569; Cooper vs. Slade, 6 E. & B., 447; 6 H. of L. Cas., 746; Gordon vs. Parmelee, 15 Gray, 413; Bradish vs. Bliss, 35 Vt., 326; Munson vs. Atwood, 30 Conn., 102; Bissel vs. Wert, 35 Ind., 54; Scott vs. Home Ins. Co., 1 Dillon C. C., 105; Huchberger vs. Merchants' Fire Ins. Co., 4 Bissel, C. C., 265; Washington Ins. Co., vs. Wilson, 7 Wis., 169; Blaeser vs. M. M. M. Ins. Co., 37 id., 31; Rothschild vs. Amer. Cent. Ins. Co., 62 Mo., 356; Ætna Ins. Co. vs. Johnson, 11 Bush., 587; Hoffman vs. W. M. & F. Ins. Co., 1 La. Ann., 216; Whitman vs. Same, 8 Rob., 442. Cases of Conover vs. Van Mater, 3 C. E. Green, 481; Taylor vs. Morris, 7 id., 606, distinguished.

Kane vs. Hibernia Ins. Co., N. J. C. E., 39 N. J., 697; 7 Ins. Law Jour., 497.

7. Arson must be specially averred as a defense, and the burden of proof is on the company.

Thurtill vs. Beaumont, 1 Bing., 339; Regnier vs. Louisiana Ins. Co., 112 La. (O. S.), 336; McConnell vs. Del. Ins. Co., 18 Ill., 228; Mayhew vs. Phoenix Ins. Co., 23 Mich. R., 105.

Residence F. Ins. Co. vs. Hannawold, Mich. S. C., 37 Mich., 103; 7 Ins. Law Jour., 220.

8. In the absence of admissions by the company defendant, the plaintiff is bound to prove the execution of the policy, the fact of the loss and its amount, and that the required notice and preliminary proofs have been given. The defense of arson in a civil suit need not be established by evidence beyond a reasonable doubt, but it must be so clearly preponderating as to establish the fact with reasonable certainty. To establish vexatious delay on the part of defendant, it must appear that there was not reasonable grounds for resistance, and the burden of proof is on plaintiff.

Mack & Co. vs. Lancashire Ins. Co. et. al., U. S. C. C., Mo., 9 Ins. Law Jour., 680.

9. Upon an information for burning a building with intent to defraud an insurance company, it was *Held*, that it was not necessary to prove the legal existence of the company. That if the company had a *de facto* organization, and was actually doing business,

and the accused believed the policy to have been legally issued, and burned the building with the expectation that the money would be paid, and for the purpose of obtaining it, it was sufficient. *Held*, that if it was necessary to prove the legal existence of the company, which was a foreign one, a certificate of the insurance commissioner of this State that the company had complied with the laws of the State, and was authorized to carry on business here, (the statute requiring the commissioner to issue such certificate only on proof of the facts, and on a deposit with him of a copy of the charter and a sworn statement of its officers,) and the testimony of the agent of the company here that he had issued numerous policies for the company, were prima facie evidence of such legal existence; the case not being one in which the company was asserting its rights, or in which its legal existence was directly in issue.

United States vs. Amedy, 11 Wheat., 392.

The fact that the policy was made payable to a mortgagee of the building, was not inconsistent with the allegation that the company insured the building to the accused. The intent to defraud the insurance company could be inferred from the circumstances, though the mere act of burning might not be sufficient.

State vs. Byrne, Ct. S. C. E., 8 Ins. Law Jour., 28.

10. In a defense on the grounds of arson and fraud, the burden of proof is on the party alleging them. The acquittal of the insured on a criminal charge of arson, is entitled to no weight in a subsequent defense against a civil suit on the same ground. The company has a right to set up the defense, and it must be decided according to the evidence offered. Where there was evidence tending to show the arrangement of a combination of combustibles in the store insured, for incendiary purposes, it is for the jury to say whether it furnishes a necessary inference that the insured placed it there, or whether the proof offered to the contrary is sufficient to overcome this theory.

Sibley vs. St. Paul F. & M. Ins. Co., U. S. C. C. Ill., 8 Ins. Law Jour., 461.

11. Where it was claimed that B., the mortgagor, burned the

building, but the policy was exclusively on the interest of F., the mortgagee; *Held*, that the fact would not affect the rights of F., and the wife of B. cannot testify to her husband's declaration as to his burning the insured premises, under the Illinois law.

Westchester F. Ins. Co. vs. Foster, Ill. S. C., 90 Ill., 12; 8 Ins. Law Jour., 596.

WHAT CONSTITUTES.

12. On trial on indictment on s. 5, c. 113, Gen. Sts., charging respondent with burning his own building with intent to defraud an insurance company, it appeared that the building was only partially destroyed, but that respondent claimed payment of the company for the damage thereby done. *Held*, that the building was burned, within the meaning of the statute.

State vs. Babcock, Vt. S. C., 51 Vt., 570.

See Cross Index at end of volume, for other cases bearing on ARSON.

ASSESSMENT.

ABSTRACT OF THE LAW.

a. Premium notes are liable to assessment on all losses occurring during the membership of the maker, and such assessments may be made after the termination of his membership.

St. Louis Mutual F. & M. Ins. Co. vs. Boeckler, 19 Mo., 135; *Commonwealth vs. Ins. Co.*, 112 Mass., 116.

b. The alienation of the insured premises usually terminates the liability to assessment on the premium note, unless otherwise stipulated.

Wilson vs. Trumbull Ins. Co., 1 Harris, 372.

c. A forfeiture of his rights under a policy by the insured does not necessarily release him from liability to assessment.

Korn vs. Ins. Co., 6 Cranch, 192.

d. It is sufficient if an assessment be levied with reasonable accuracy.

N. E. Mut. Ins. Co. vs. Belknap, 9 Cush., 140; *People's Ins. Co. vs. Allen*, 10 Gray, 297.

e. Assessments improperly levied for losses or expenses for which the members were not liable, are void.

Hartford Mut. Ins. Co. vs. Hayward, 3 Gray, 208; *Long Pond Mut. Ins. Co. vs. Houghton*, 6 Gray, 77; *People's Equitable Mut. Ins. Co. vs. Arthur*, 7 Gray, 267; ditto vs. Babbitt, 7 Allen, 235; *Commonwealth vs. Mechanics' Mut. Ins. Co.*, 12 Mass., 192.

See further on this subject under MUTUAL COMPANY, PREMIUM NOTE.

DIGEST OF RECENT CASES.

ASSESSMENT—VALIDITY OF.

1. An assessment made by the receiver of the Slater Mutual Fire Insurance Company; *Held*, not invalid because he had assessed, for dividends due, parties insured in the "Manufacturers' Class" of said company, inasmuch as, such dividends being due, parties so insured might properly be considered in making up the amount necessary to be assessed to pay all the debts of the company.

One liable to assessment in a mutual insurance company cannot avoid his assessment by proving that it had been made as well upon parties not liable as upon parties liable thereto, for the reason that even if this be so he has no ground for complaint, the burden upon him being actually diminished thereby.

Parties insured in a mutual insurance company gave premium notes in the following form :

"Deposit Note. Policy No. —. For value received I promise to pay the Slater Mutual Fire Insurance Company, or their order, dollars, at such time and by such installments as the directors of said company shall, from time to time, assess and order, pursuant to the charter and by-laws of said company."

Held, that the statute of limitations did not begin to run against such notes until an assessment had been made thereon to pay losses incurred.

Although a notice has been given by public advertisement, by the receiver of a mutual insurance company, to all persons, to present their claims against the same within a specified time, an assessment made against said company by the receiver of another company, after the time named in such notice has expired and an assessment has been made based upon the claims presented in accordance therewith, must, if otherwise justly due, be paid in the same proportion in which other claims are paid, provided there still remain in the hands of such first named receiver, at its presentation, sufficient funds therefor.

To justify an assessment by a mutual insurance company upon

an alleged lost or missing note, proof must be furnished of its having at some time existed unpaid and uncanceled, and the records of the company stating the giving of such a note do not furnish sufficient evidence thereof, as the books of a corporate company are not evidence, as against a member of the corporation, of his contracting with the company.

In the matter of the Slater Mutual Fire Ins. Co., R. I. S. C., 4 Ins. Law Jour., 322.

2. Property insured by A., in a mutual company, was transferred by him, together with his right, title and interest in the policy, to B. B. made an absolute transfer of the property, but not of the policy, to C., who at the same time conveyed the premises to the wife of B.

Held, that B. was liable to the company for an assessment. The court say: "The alienation of the property avoided the policy only as to the right of the assured to recover upon it against the company. It did not entitle him to release himself from the obligations which he assumed when he obtained the insurance and became a member of the corporation.

Cummings vs. Sawyer, Mass. S. J. C., 55 N. H., 457; 4 Ins. Law Jour., 396.

3. The defendant subscribed for capital stock on the terms and conditions that twenty per cent was to be paid when the list was completed, "and the remainder, eighty per cent, unpaid on stock account, is to be assessed only in the event of the twenty per cent cash fund becoming impaired by losses." Suit was brought to recover an assessment of twenty per cent. *Held*, that it was not necessary to aver in the complaint that the assessment was made in accordance with the charter or by-laws of the company; where such averment has been held essential, it has been founded on some provision of the charter or by-laws, or on some phraseology of the subscription or premium note. *Held*, that the resolution of assessment passed by the company was not a written instrument within the meaning of the Indiana statute, sec. 78, p. 73, vol. 2, R. S. 1876, and a copy filed with the complaint did not become a part of it so as to bring the resolution before the court on demurrer.

Pollock vs. Bowen, 56 Ind.; Wilson vs. Vance, 55 Ind., 584; Noble vs. McGinnis, 55 Ind., 528.

Notice to a member of an assessment against him is not necessary in Indiana in the absence of any provision in the charter or by-laws, or of any stipulation requiring it.

Fisher vs. E. & C. R. R. Co., 7 Ind., 407; Ross vs. L. & I. R. R. Co., 6 Ind., 297; Peake vs. Wabash R. R. Co., 18 Ill., 88.

Where a party contracts to pay assessments that may be made against him for certain purposes, his agreement is one that may be ordinarily enforced against him by any insurance company.

Angell and Ames on Corp., sec. 548.

A transcript of certain proceedings of the board of trustees, setting forth that whereas some two hundred and fifty or three hundred thousand dollars had been lost at Chicago, resolved that it was expedient to call for twenty per cent to liquidate the loss and keep the stock unimpaired, and authorizing and instructing the officers to make said assessment payable, etc., was sufficient evidence that the assessment had been made, and the proceedings fixed the defendant's liability. The duties enjoined on the officers were merely clerical.

Van Riper vs. American Central Ins. Co., Ind. S. C., 60 Ind., 123; 7 Ins. Law Jour., 458.

EFFECT OF NON-PAYMENT ON THE POLICY.

4. The failure to pay the assessments under the premium notes of this company does not make the policy null and void; it is only null and void until the assessments are collected.

Hammel et al. vs. Lycoming Fire Ins. Co., Pa. S. C., 5 Ins. Law Jour., 160.

5. Publication of notice of assessment in papers is not evidence of notice to policy holder of forfeiture for non-payment of assessment.

Mut. F. Ins. Co. vs. Hoff, Pa. S. C.

6. A provision in a mutual policy that it should be suspended during the non-payment of an assessment when due, is not waived by a mere notice from an agent having no power to waive the essential features of the policy, that the assessment remained un-

paid; nor is a notice from the agent of a subsequent assessment a waiver, in the absence of any evidence that such assessment had been laid by the company, or that the agent had been authorized to give such notice.

Leonard vs. Lebanon Mut. Ins. Co., Pa. S. C., 7 Ins. Law Jour., 79.

7. In an action against a mutual fire insurance company upon a policy of insurance against fire, it appeared that a by-law of the company provided that: "If the insured shall neglect for the space of ten days, when personally called on, or after notice in writing has been left at his last and usual place of abode or business, to pay any assessments, the risk of the company shall be suspended until the same is paid; and if the assured shall refuse to pay any assessment, or if for any other cause the risk is considered unequal or injurious to the company, the directors may terminate the same by giving notice thereof, signed by the secretary, either personally or by mail to the insured." The company levied an assessment and sent notice to the plaintiff of the amount due on his policy, and that a failure to respond for thirty days would render the policy void. The notice was signed by the treasurer and accompanied by a statement of the condition of the company, and a copy of the vote of the directors, signed by the secretary. The vote recited that the policies of all holders who paid the assessment according to law should continue in force, and the policies of all holders who should not pay the same within thirty days after the time when the same was collectible should be canceled. The assessment was not paid, and nothing further was done by the company in regard to the policy before the property insured was destroyed by fire more than the thirty days after the notice was received. *Held*, that a failure to pay the assessment within ten days after notice suspended the risk under the first clause of the by-law; that the vote of the directors had reference merely to the second clause of the by-law; and that the plaintiff could not maintain the action. A by-law of a mutual fire insurance company provided that: "If the insured shall neglect for the space of ten days, when personally called on, or after notice in writing has been left at his last and usual place of

abode or business, to pay any assessment, the risk of the company on the policy shall be suspended until the same is paid." A policy holder was not personally called on for an assessment, and a notice in writing was not left at his last and usual place of abode or business, but he received notice by mail, and had some correspondence with the company about the assessment, which he did not pay, but made no objection to the way in which the notice reached him, until after the building insured was destroyed by fire, some months after the notice was received. *Held*, in an action on the policy, that any objection to the manner of receiving the notice must be deemed to have been waived. If the by-law of a mutual fire insurance company provides that any risk insured shall be suspended, unless an assessment is paid within a certain time, it is not a valid excuse on the part of a member, for a neglect to pay the assessment, that the company owes him a less sum, if he does not offer to pay the balance.

Hollister vs. Quincy Ins. Co., Mass. S. J. C., 118 Mass., 478.

8. Members of mutual insurance companies, who are in arrears on assessments, cannot recover payment for losses happening during such default. A failure to pay an assessment when legally due suspends protection during default; but if the defaulting member pays the dues in arrear, with the concurrence of the company, before loss, the policy revives in full vigor. The fact that the company was in the habit of accepting overdue assessments, and that notice had been given that assessments unpaid in a given time would have a penalty attached, will not excuse a member whose property was destroyed between the date of the notice and the day named.

Washington Mut. F. Ins. Co. vs. Resenberger, Light & Co., Pa. S. C., 7 Ins. Law Jour., 185.

9. Although a condition in the policy of a mutual company declares a policy void on failure to pay an assessment within a specified time, yet the contract is not wholly destroyed, and if payment is made before loss, the policy will revive; its protection, however, is suspended during default.

Hummel & Co.'s Appeal, 28 P. F. S., 320; Ins. Co. vs. Buckley, 2 Norris, 293; Ins. Co. vs. Rosenberger, 3 ib., 373.

Where an assessment has been levied and not paid by the assured, the mere fact that the company levies another assessment on the insured, is not a waiver of the right to demand payment of the first assessment, nor does it remove the consequences flowing from the neglect to pay said assessment. An agent whose powers are limited to the taking of insurance and collecting of a certain portion of the premium note at the time it is given, has no authority to receive payment for the company of subsequent assessments, even in money; *a fortiori* he cannot bind the company by accepting labor in payment of an assessment.

Crawford Co. Mut. Ins. Co. vs. Cochran, Pa. S. C., 88 Pa., 230; 8 Ins. Law Jour., 549.

10. Where a mutual insurance company imposes forfeiture in case a loss occurs while its assessments are still unpaid, but its local agent receives past due assessments with knowledge of a loss, and forwards them to the company without notifying it thereof, and it receives them, and two or three weeks afterward orders the loss to be paid when adjusted, it cannot afterward refuse payment on the ground of the delay in paying the assessments, since it has waived that by receiving them when overdue, and ordering payment.

Farmers' Mut. F. Ins. Co. vs. Bowen, Mich. S. C., 40 Mich., 147; 8 Ins. Law Jour., 257.

See Cross Index at end of volume, for other cases bearing on ASSESSMENT.

ASSIGNMENT.

ABSTRACT OF THE LAW.

a. Policies of fire insurance are not assignable without the consent of the insurer, so that an action can be maintained in the name of the assignee; but unless prohibited by the policy, the assignment may be valid, and may be enforced in the name of the assignor.

Columbian Ins. Co. vs. Morris, 2 Pet. (U. S.), 25; Ford vs. Middlesex Ins. Co., 10 Cush. (Mass.), 327; Jessel vs. Ins. Co., 3 Hill (N. Y.), 88.

b. An assignment in violation of the policy is invalid, but the contract remains good as to the original insured, unless otherwise stipulated.

Smith vs. Saratoga Ins. Co., 3 Hill (N. Y.), 503; *Earl vs. Shaw*, 1 Johns. Cas. (N. Y.), 314.

c. But an assignment in violation of the conditions of the policy will work a forfeiture if so stipulated.

Smith vs. Saratoga Mut. Ins. Co., 1 Hill, 197; *Dey vs. Poughkeepsie Ins. Co.*, 23 Barb., 623.

d. An assignment after loss is valid even though prohibited by the policy.

Carroll vs. Ins. Co., 1 Abb. Dec. (N. Y.), 316; *Perry vs. Ins. Co.*, 25 Ala., 355; *Courtney vs. N. Y. City Ins. Co.*, 28 Barb. (N. Y.), 116.

e. "Loss payable to," etc., is not usually regarded as an assignment.

Fogg vs. Middlesex Ins. Co., 10 Cush. (Mass.), 346; *Hale vs. Mechanics' Ins. Co.*, 6 Gray (Mass.), 169.

f. The pledge of a policy as collateral security is not a violation of a prohibition against its assignment.

Hitchcock vs. N. W. Ins. Co., 26 N. Y., 68; *People vs. Beigler*, Hill & D., 133.

g. Nor does an order upon the insurer in favor of a third party operate as an assignment.

Ross vs. Ins. Co., 52 Me., 187.

h. In the absence of a new contract with the assignee, the rights of the latter are affected by the acts of the original insured, notwithstanding consent of the assurers to the assignment.

Grosvenor vs. Atlantic Ins. Co., 17 N. Y., 391; *Loring vs. Ins. Co.*, 8 Gray (Mass.), 28; *State Mutual F. Ins. Co. vs. Roberts*, 31 Penn. St., 438; *Merrill vs. Ins. Co.*, 48 Me., 285.

i. The transfer of the property, however, together with an assignment of the policy, with consent of insurers, creates a new contract with the assignee, and his rights are no longer subject to defeat by the acts of the original insured.

Foster vs. Ins. Co., 2 Gray (Mass.), 216.

j. Transfer of the subject of insurance does not operate as an assignment of the policy.

Wheeling Ins. Co. vs. Morrison, 1 Leigh (Va.), 354; *Stout vs. City Ins. Co.*, 12 Iowa, 371.

k. A prohibition against the assignment of any interest in the policy is violated by its pledge as security or otherwise.

Lawrence vs. Com. Ins. Co., 5 Pick. (Mass.), 76.

l. Consent to an assignment by an authorized agent is a waiver of a policy requirement that such consent should be indorsed.

Ill. Ins. Co. vs. Sanford, 2 Ins. Law Jour., 29.

See further on this subject under INCUMBRANCE, INSOLVENCY, INSURABLE INTEREST, MORTGAGE, MORTGAGEE AND MORTGAGOR, POLICY, SUBROGATION, TITLE.

DIGEST OF RECENT CASES.

ASSIGNMENT—WHAT CONSTITUTES.

1. Where the charter required the assignment of policy to be made within thirty days after alienation, and the policy required it to be within ten days with the approbation of the company, an allegation showing a transfer after thirty days with the approbation of the local agent, in which there was no considerable consideration paid by the assignee except what belonged to payment already due, does not show a complete assignment according to the requirements.

American Ins. Co. vs. Gallagher, Ind. S. C., 50 Ind., 207; 5 Ins. Law Jour., 200.

A. effected insurance with B., and shortly afterward caused a memorandum to be made in writing on the policy, with the consent of B., that the loss, if any, was to be paid to C. *Held*, that C. was not the assignee of the policy, but was the party to whom the loss, if any, was payable. If this memorandum was made as collateral security to C., for a debt owing him by A., payment of the debt will, without more, enable A. to recover to his own use any loss on the policy. During the time when the debt to C. continued unpaid, A. sold to D. the property insured, informed B. thereof, and caused a memorandum to be made on B.'s policy register, stating the value of the policy, and that it was transferred to D. *Held*, that this memorandum made by B. operated as an assignment of the policy to D. The debt to C. was paid by D., after which the property was destroyed by fire. *Held*, that D. was entitled to recover the loss.

Griswold vs. American Central Ins. Co., St. Louis C. A., 7 Ins. Law Jour., 639.

2. Where the policy was after the loss forwarded to plaintiff in pursuance of an understanding as his property to apply in settling indebtedness, and an order was also drawn on the company, requesting payment to him and that his receipt should be

full discharge. *Held*, that plaintiff was the owner; that there was a legal assignment to him.

Hooker vs. Eagle Bank, 30 N. Y., 83; *Mack vs. Mack*, 3 Hun., 323; *Doremus vs. Williams*, 4 Ib., 458.

Held, that an action brought in his own name in New York upon a judgment recovered in name of assignor to his use in another State, where the assignee could not sue in his own name, will be sustained.

Morton vs. Morton, 13 S. & R., 107; *Welch vs. Mandeville*, 1 Wheat., 203 and note; *M'Cullum vs. Coxe*, 1 Dallas, 139; *Canby vs. Ridgway*, 1 Binney, 496; *Southgate vs. Montgomery*, 1 Paige Ch., 41-47.

Held, that a trust deed providing for an assignment whenever trustee desired it, for the benefit of assignor would not of itself be an absolute assignment.

Greene vs. Republic F. Ins. Co., N. Y. C. A., 10 *Ins. Law Jour.*, 422.

WHEN IT FORFEITS THE POLICY.

3. The policy insured the mortgage interest of G. W. afterward bought the property and paid off the mortgage. The company on the request of W. subsequently indorsed its consent to an assignment of G.'s interest to W. The company was not informed that W. had bought the property. *Held*, that the company intended to do nothing more for W. than for G., and being deprived of the right of subrogation by the change, the policy was invalid.

Wall vs. Commercial Ins. Co., Cincinnati, O., Sup. Ct., 7 *Ins. Law Jour.*

4. The assignee of a policy takes only such rights as belonged to the assignor.

Bowditch Ins. Co. vs. Winslow, 8 Gray, 33; *Loring vs. Manufacturers' Ins. Co.*, 8 Gray, 28; *Lawrence vs. Holyoke Ins. Co.*, 11 Gray, 387.

Where the assignor, to whom the policy was issued, had no insurable interest, it was void in her hands, and an assignment consented to by the company, where no consideration passed, did not make any new undertaking beyond a substitution of the parties. The case differs from those where the assignees in

mutual companies give new premium notes or assume old ones, or where the company agrees in writing that it shall continue in force to the assignees.

Foster vs. Equitable Ins. Co., 2 Gray, 216; *Tripp vs. Pacific Ins. Co.*, 7 Allen, 230.

McCluskey et al. vs. Providence-Washington Ins. Co., Mass S. J. C., 126 Mass., 306; 8 *Ins. Law Jour.*, 413.

5. An insurer may insert a binding clause in the policy determining the policy upon assignment without his written consent, and no action can be maintained by assignee.

Jessel vs. Ins. Co., 3 Hill, 88; *Pollard vs. Ins. Co.*, 42 Me., 227; *Smith vs. Ins. Co.*, 3 Hill, 510.

Waterhouse vs. Gloucester F. Ins. Co., Me. S. C., 68 Me., 409; 9 *Ins. Law Jour.*, 15.

WHEN IT DOES NOT FORFEIT THE POLICY.

6. The policy provided that a conveyance of the property or assignment of the policy, not assented to by the company, shall render the policy void. W., the insured, execute to B. a bill of sale of the property. The inventory was completed and possession given two days later, at which time W. wrote an assignment on the back of the policy to B. W. then sent the policy to the agent who issued the policy, but from whom the agency had since been withdrawn, who at the request of W. indorsed his consent to the transfer, but at the same time informed the messenger that his act had no legal validity. The secretary of the company was then shown the policy and informed that W. was the owner of the property, and asked if the assignment and consent were all right; he said yes. The secretary was not informed of the circumstances under which the agent's consent was given, nor was the latter informed of the transfer of the property. *Held*, that as the transfer of the policy was part of the contract of sale, the sale might be regarded as incomplete until this had been fully effected.

Manly vs. Ins. Co. of N. A., 1 Lansing, 20.

But if the transfer of property be regarded as prior to the

company's consent to a transfer of the policy, there is authority for holding that the policy was revived by subsequent consent.

Shearman vs. Niagara Ins. Co., 46 N. Y., 526.

Held, that there was nothing in the terms of the policy to require the consent to be previous to transfer of title to give it validity. *Held*, that the agent, having surrendered his agency, and balanced his accounts, had no authority to give the assent, and notice of this fact given to the messenger at this time was notice to the principal.

Story on Agency, sec. 140; *Bank of U. S. vs. Davis*, 2 Hill, 451; *Jeffrey vs. Bigdon*, 13 Wend., 518; *Sutton vs. Dillage*, 3 Barb., 529.

Held, that the consent of the secretary may be regarded as a ratification of the agent's consent, or a new consent, in either case binding the company.

Buchanan vs. Exchange Fire Ins. Co., N. Y. Com. A., 4 *Ins. Law Jour.*, 457.

7. The policy insured A., "his heirs and assigns." A. sold his house to B., and assigned his policy, covering house and furniture and clothing therein, to B., with consent of company indorsed. A. moved his furniture and clothing away, and B. moved his furniture and clothing into the house. *Held*, that insurance is a contract of indemnity, and appertains to the person or party to the contract and not to the thing which is subjected to the risk. It is not a contract running with the land in the case of real estate, nor with the personalty in case of a chattel interest.

Lucena vs. Crawford, 2 Bos. & Pul. (N. R.), 300; *May on Ins.*, § 1, 2, 6; *Bl. Com.*, 458; *Carpenter vs. Ins. Co.*, 16 Pet., 495; *Angel on Ins.* § 1; *Sadlers Co. vs. Babcock*, 2 Atk., 554; *Wilson vs. Hill*, 3 Metc., 66; *Ellis on Ins.*, 1; *Williams on Pers. Prop.* *179; 1 *Phillips on Ins.*, 1; *Lane vs. Maine M. Fire Ins. Co.*, 12 Me. (3 Fair.), 44, 49.

Held, that the assent of the insurer to the assignment constituted a new and valid contract with the assignee to indemnify him in the same manner as the original insured, for which the unexpired premium, already paid, and exemption from liability to the vendor, were sufficient consideration.

Wilson vs. Hill, 3 Metc., 66; *Rollins vs. Ins. Co.*, 25 N. H., 207; *Folsom vs. Ins. Co.*, 30 N. H., 240; *Fogg vs. Ins. Co.*, 10 Cush., 337.

Held, that the policy covered B.'s furniture and clothing.

Cummings vs. Cheshire Co. M. F. Ins. Co., N. H. S. C., 55 N. H., 457; 4 Ins. Law Jour., 932.

8. Appellant recovered a judgment for \$1,500 against the Lamar Ins. Co., a bankrupt. Previous to the recovery the policy had been assigned to an agent of the People's Ins. Co., in which the Lamar's risks had been reinsured, for \$500, on his representations that he was the adjuster of the Lamar, and if it ever paid more than 25 per cent of its claims, appellant would be entitled to as much as any one else. The judgment was for the balance of the claim. The claim was disallowed by the master appointed to take proofs of claims against the Lamar. *Held*, that the master's decision might be appealed from.

Derrick vs. Lamar Ins. Co., Ill. S. C., 1874.

Held, that the claim should have been allowed.

Womer vs. Lamar Ins. Co., Ill. S. C., 5 Ins. Law Jour., 795.

9. A policy insuring a mercantile firm, their administrators or assigns, provided that if the policy or any interest therein should be assigned without consent, it should be void. One of the firm retired and assigned his interest in the policy and stock to the remaining partners. The policy contained no clause relating to alienating the property.

Held, that under the common law pleadings there could be no recovery because the contract was joint, and one having parted with his interest could not be joined.

Murdock vs. Chenango Ins. Co., 2 Comst., 210; Tate vs. Citizens' Ins. Co., 13 Gray, 19.

But under the Ohio code recovery could be had on suit of the remaining parties in interest. *Held*, that an assignment within the meaning of the clause, must be an assignment by the firm not an individual member.

Masters vs. Madison County Ins. Co., 11 Barb., 624; Angell on Ins., 197
Pierce vs. Nashua Fire Ins. Co., 50 N. H., 297.

The object of the stipulation was to guard against the introduction of a stranger, not to prohibit a change of interests between the partners, and the policy was not avoided by the assignment.

May on Ins., § 275; Hoffman vs. Ætna Ins. Co., 32 N. Y., 411; 32 N. Y., 414.

Held, that the remaining partners might recover the entire amount to which the original firm would have been entitled.

Hoffman vs. *Ætna Ins. Co.*, 32 N. Y., 415; case of Hobbs et al. vs. Memphis Ins. Co. and others, excepted to.

West et al. vs. Citizens' Ins. Co., S. C. Com. Ohio, 27 Ohio, 1; 5 *Ins. Law Jour.*, 434.

10. The policy provided that unless its assignment is approved by the company by an indorsement thereof, the policy shall be void. *Held*, that the courts will only enforce such a provision if the assignment was made before the loss.

Minturn vs. *Ins. Co.*, 10 Gray (Mass.), 507; Smith vs. *Ins. Co.*, 1 Hill (N. Y.), 497.

Held, that the company by its conduct may waive such a provision.

Pennsylvania *Ins. Co. vs. Bowman*, 44 Pa. St. R., (8 Wright,) 89; Muleman vs. *National Ins. Co.*, 6 W. Va., 508; Bigelow on Estoppel, 524, 553; Ripley vs. *Ætna Ins. Co.*, 30 N. Y., 136, 164; 50 N. Y., 575; Herman's Law of Estoppel, 343, 331.

Stolle vs. Ætna Ins. Co., W. Va. S. C. A., 10 W. Va., 546.

11. A policy of insurance issued to a mortgagee, contained a stipulation that the insurance might be terminated at any time at the request of the assured, the company only retaining customary short rates; also, that if any change took place in the title or possession, the policy should be void. Without the knowledge of the company, the owner sold and conveyed the property, and satisfied the mortgage. *Held*, that a subsequent assignment of the policy by the mortgagee to the purchaser, and a verbal agreement between the latter and an agent of the company, having power to make contracts and issue policies, that such assigned policy shall have the force and effect of a new policy to the purchaser, will bind the company.

Wood on *Ins.*, secs. 10, 407; Pratt vs. *N. Y. Cent. Ins. Co.*, 55 N. Y., 505; *Ins. Co. vs. Olmstead*, 21 Mich., 246; Dayton *Ins. Co. vs. Kelly*, 24 O. St., 345; Relief Fire *Ins. Co. vs. Shaw*, 94 U. S., 574; May on *Ins.*, 41; Flanders on *Ins.*, 118.

Case of Cockrill vs. *Cinn. Mut. Ins. Co.*, 16 Ohio, 148, excepted to.

Held, that there was no necessity for a reformation of the

policy. *Held*, that an obvious clerical blunder would be disregarded.

Amazon Ins. Co. vs. Wall, Ohio S. C., 31 O., 628 ; 7 *Ins. Law Jour.*, 704.

12. An assignment of a policy of insurance by a bankrupt to his assignee is a transfer of the legal title with power to administer, rather than an assignment by way of sale, and unless specially prohibited in the policy does not avoid it.

Fayette Co. Mut. F. Ins. Co. vs. Neel, assignee, Pa. S. C., 8 *Ins. Law Jour.*, 265.

13. That there was no sufficient assignment under the terms and conditions of the policy, implies that the assignment was invalid, because not in accordance with the terms of the policy, and such finding cannot be sustained where the assignment was subsequent to the loss ; such assignment is valid regardless of the conditions of the policy.

May on Ins., 468 ; *Wood do.*, 189.

Dogge vs. N. W. Nat. Ins. Co., Wis. S. C., 49 *Wis.*, 501 ; 9 *Ins. Law Jour.*, 574.

GENERALLY.

14. When an insured building is burned after the death of the insured, and after the assignment of said building to the widow as dower, but before the expiration of the policy, the proceeds of the policy belong to the widow to the extent of her dower interest, with remainder to the heirs.

Hudnall, executor, vs. Burkle et al., First Chancery Ct. Shelby Co., Tenn., 5 *Ins. Law Jour.*, 239.

15. After the assignment of the policy the original insured had become indebted to the company for premiums on other policies. *Held*, that the insurer was not entitled to set off this indebtedness against a claim by the assignee.

Pellas vs. Neptune Mar. Ins. Co., Eng. C. A., 1879.

See Cross Index at end of volume, for other cases bearing on ASSIGNMENT.

AVERAGE.

See ADJUSTMENT, GENERAL AVERAGE, PARTICULAR AVERAGE.

See Cross Index at end of volume, for cases bearing on AVERAGE.

BARRATRY.

ABSTRACT OF THE LAW.

a. Barratry is any wrongful act of the master, officers or crew, done against the owner.

Kruger vs. Cambridge, 1 Stra., 591; *Stone vs. National Ins. Co.*, 19 Peck, 84; *Patapsco Ins. Co. vs. Coulter*, 3 Pet., 222; *Ward vs. Wood*, 13 Mass., 539; *Citizens' Ins. Co., vs. Marsh*, 41 Pa. St., 336.

b. The act must be intentional and wrongful in itself and wrongfully intended.

Dederer vs. Delaware Ins. Co., 2 Wash. C. C., 61; *Ford vs. Riche*, 1 Stark, 240.

c. A deviation that is barratry operates not as a deviation but as barratry. *Parsons on Marine Ins.*, 570.

d. The master or part owner may commit barratry against the remaining owners and the charterer.

Strong vs. Martin, 1 D. D. & M. S. C., 1245; But per contra, *Wilson vs. Ins. Co.*, 12 Cush., 360.

e. But the master, when sole owner, cannot commit barratry.

Barry vs. Ins. Co., 11 Mart. La., 630.

See further on this subject under MASTER, NEGLIGENCE, PERILS OF THE SEA.

DIGEST OF RECENT CASES.

1. Mere negligence or an innocent breach of duty will not constitute barratry. The act must be willfully or fraudulently wrong. A fraudulent intention to injure the owner is not necessary; it is sufficient that there is a deliberate and palpable breach of duty toward the owner.

2 *Arnold on Ins.*, 821, note *k*; 1 *Phillips on Ins.*, § 1062-1074; 2 *Pars. on Mar. Law*, 233, 239, 246; 3 *Kent Com.*, 303; *McCullough's Dictionary of Com.*

and Nav., tit. "Barratry;" *Cook vs. Com. Ins. Co.*, 11 J. R., 40-46; *Am. Ins. Co. vs. Bryan*, 26 Wend., 578.

The policy insured against the "barratry of the master and mariners." The bill of lading required the cotton to be stowed below deck. The master, without the knowledge of the owner and against the remonstrance of the ship-owner's agent, stored a portion on deck, whence it was jettisoned into the sea during a storm. *Held*, that the act of the captain was in itself wrongful and a violation of his duty toward the owners; if wrongfully intended it was barratrous. *Held*, that the question of intent was for the jury, to whom the whole question of barratry should have been submitted as a question of mixed law and fact. *Held*, that the wrongful act of the captain was the direct cause of loss.

Phyn vs. Royal Ex. Ass. Co., 7 Term R., 501; *Wilson vs. Rankin*, 6 Best & Smith, 208; S. C., L. R., 1 Q. B. 166; *Earl vs. Rowcroft*, 8 East., 126; *Salonica vs. Johnson*; *Park on Ins.*, ch. 18; *Moss vs. Bryan*, cited in *Earl vs. Rowcroft*; *Boehm vs. Combe*, 2 Mau. & Sel., 172; *Lawton vs. Sun Mut. Ins. Co.*, 2 Cush., 500; *Patapsco Ins. Co. vs. Coulters*, 3 Peters, 231; *Burk vs. Royal Ex. Ins. Co.*, 2 Barn. & Ald., 82; *Parkhurst vs. Gloucester Mut. Fishing Ins. Co.*, 100 Mass., 301; *Grim vs. Phoenix Ins. Co.*, 13 Johns., 451; *Heyman vs. Parish*, 2 Camp., 149; *Knight vs. Cambridge, Strange*, 531; *Mod. Rep.*, 230, and 2 Ld Raym., 1349; *Vallego vs. Wheeler, Cowper*, 142; *Goodman vs. Harvey*, 4 Adol. & Ell., 870.

Atkinson vs. Great Western Ins. Co., N. Y. C. A., 65 N. Y., 531; 4 *Ins. Law Jour.*, 751.

2. The insurer is liable for the wrong done by the master against the shipper and for the perils insured against, even though in consequence of the negligence of the insured, if not gross or willful misconduct; much more is he liable for the consequences of the negligence of the master.

Earl vs. Rowcroft, 8 East., 126; *Johnson vs. Berkshire Ins. Co.*, 4 Allen, 388; 2 *Phil. on Ins.*, § 1049, 1096.

A charge implying that the shipper was responsible for the mere negligence or carelessness of a competent master not barratrous, was properly refused.

Sturm vs. Atlantic Mut. Ins. Co., N. Y. C. A., 63 N. Y., 781; 5 *Ins. Law Jour.*, 209.

3. The burden of proof of barratry is on the insurer, through a preponderance of evidence. It is not necessary for insured to prove how the hole through which the vessel sank was made if

the jury do not believe it was done by those in his employ or by himself.

McGraw vs. Merc. Ins. Co., U. S. C. C., Ill.

See Cross Index at end of volume, for other cases bearing on BARRATRY.

BENZINE.

See KEEPING AND STORING, POLICY, PROHIBITED RISK, RISK.

See Cross Index at end of volume, for cases bearing on BENZINE.

BOND OF INDEMNITY.

DIGEST OF RECENT CASES.

1. Defendant executed a bond of indemnity to an insurance company against all claims of C. against moneys paid by the company to the sheriff, and all costs, damages, and expenses arising therefrom. *Held*, that the word "claims," included all such as were asserted by legal proceedings, whether afterward adjudged invalid or not.

Lawrence vs. Miller, 2 Comst., 245.

Held, that the company had a right to be indemnified for the expense of defending such illegal claims.

Chamberlain vs. Beller, 18 N. Y., 115.

The bond being under seal, there was a presumptive consideration which throws the onus of disproof on the obligor. The performance of a legal obligation of undoubted validity is not a sufficient consideration.

Macdonald vs. Wilson, 2 Cowan, 139; Crosby vs. Wand, 6 N. Y., 369.

But if the obligation be doubtful, a waiver of the right to contest it constitutes such consideration.

Russell vs. Cook, 3 Hill, 504; Seaman vs. Seaman, 12 Wend., 381; Palmer vs. North, 35 Barb., 382.

Home Ins. Co. vs. Watson et al., N. Y. C. A., 4 Ins. Law Jour., 606.

See Cross Index at end of volume, for other cases bearing on BOND of INDEMNITY.

BOOKS OF ACCOUNT.

See PROOF OF LOSS.

See Cross Index at end of volume, for cases bearing on BOOKS OF ACCOUNT.

BOTTOMRY BOND.

ABSTRACT OF THE LAW.

a. Loans on bottomry or respondentia are of the nature of a mortgage, except that no recovery can be had if the thing pledged be wholly lost; and the insurable interest is limited to the risks assumed by the lender.

Thompson vs. Royal Exchange Ass. Co., 1 M. & S., 30; Broomfield vs. Ins. Co., 5 L. R. Ex., 192; Greeley vs. Waterhouse, 19 Me., 9.

b. The lender on bottomry has an insurable interest in the thing pledged.

Williams vs. Smith, 2 Davies, 13; Kenney vs. Clarkson, 1 Johns., 385.

c. A bottomry bond may usually be made by the owner at will, but by the master only in case of a justifiable necessity when abroad.

Conrad vs. Atlantic Ins. Co., 1 Pet., 386; Greeley vs. Waterhouse, *supra*; The Oriental, 3 W. Rob., 243; Wilkinson vs. Wilson, 8 Moore P. C., 459; Agricultural Bank vs. Bark Jane, 19 La., 1; The Virgin, 8 Pet., 538.

d. The ship cannot be hypothecated for the benefit of the cargo nor for that of the master, but the cargo may be pledged in case of necessity for the ship.

Fontaine vs. Ins. Co., 9 Johns., 29.

e. The necessity for bonding must be determined by the lender at his peril.

Walden vs. Chamberlain, 3 Wash. C. C., 290; The Aurora, Wheat., 96; Clark vs. Laidlaw, 4 Rob., (La.,) 345.

f. Contribution under a bottomry bond must depend upon a special stipulation with the company, otherwise it does not exist.

Robertson vs. United Ins. Co., 2 Johns. Cases, 250; The Boston, 1 B. & H., 399; Gibson vs. Philadelphia Ins. Co., 1 Binn., 405.

g. Freight as well as vessel may be hypothecated.

The Ship Packet, 3 Mason, 255; The Jacob, 4 Rob. Adm., 245; The Danforth, 3 W. Rob., 73.

DIGEST OF RECENT CASES.

1. In a suit between the insurers of cargo and agents of the holders of a bottomry bond who held the proceeds of sale of saved portion of the cargo on account of the bond. *Held*, that where the vessel did not arrive in safety, but the voyage was terminated by a sale at an intermediate place, while the vessel existed *in specie*, and was only constructively totally lost, but not utterly lost within the meaning of the bond, the property saved continues subject to hypothecation to the owners of the bond.

Delaware Mut. Safety Ins. Co. vs. Gossler et al., U. S. D. C., Mass.

2. Maritime hypothecations, when properly authorized and duly executed, are of a privileged character, and held in great sanctity by the courts. The owner is bound by all lawful contracts of this kind by the master. Such contracts must be based on the necessity of obtaining supplies and repairs for the prosecution of the voyage, and on the inability of otherwise obtaining funds.

The Vibilia, 1 W. Rob., 14; *The Rhadamanthe*, 1 Dod., 209; *The Hammersley Castle*, 3 Hagg., 7; *The Hero*, 2 Dod., 140; *The Aurora*, 1 Wheat., 101; *Brig Rich*, 1 Cliff., 314; *The Reliance*, 3 Hagg., 74; *Thomas vs. Osborn*, 19 How., 31; *The Hersey*, 3 Hagg., 407; *The Fortitude*, 3 Sum., 234; 1 Conkl. Adm. (2d ed.), 269; *Abbott on Ship*. (11th ed.), 126.

Plaintiffs were underwriters on the cargo. The vessel being disabled by a hurricane during her voyage, the master was compelled to execute a bottomry bond on vessel, freight, and cargo, to secure the repairs necessary for its completion. She was afterward wrecked, and the agents of the bondholders, defendants, succeeded in rescuing half of the cargo, which was subsequently sold, with the consent of the owners. The vessel was found incapable of repair, and the owners of the cargo abandoned to the underwriters, who upon payment of the claim took an assignment of their interest. *Held*, that it is now well settled that the hypothecation by the master may extend to the cargo, of which he is the mere depositary and common carrier, as well as to the ship and freight.

The *Cochrane*, 1 W. Rob., 314; The *Gratitude*, 3 C. Rob., 257; The *Packet*, 3 Mason, 257; The *Zephyr*, 3 id., 343; *Ins. Co. vs. Scott*, 1 John., 110; *Fontaine vs. Ins. Co.*, 9 id., 30; *Searle vs. Scovell*, 4 John. Ch., 222; *Ins. Co. vs. Coster*, 3 Paige, 332.

The bond stipulated that in case of an utter loss of the vessel it should not be payable, and all parties liable should be discharged; that the loss should be wholly borne by the bondholders, who should, however, "be entitled to such average as can be hereby lawfully secured to them on all salvage recoverable in respect to the vessel, freight, and goods, or any of them." In an action against the defendants to recover money received from the sale of the goods,—*Held*, that the holder of the bottomry bond is to be preferred over the insurer or owner to the extent of his legal claim for principal and marine interest.

Citing 3 Boulay-Paty, *Cours de droit commercial maritime*, 183; *Stephens vs. Broomfield*, Law Rep., 2 P. C. Appeals, 522; 2 Emerigon, *Traité des Contrats a la grosse*, 544; The Great Pacific Law Rep., 2 Adm. & Ecc., 382.

Held, that the vessel must be actually destroyed and the loss to the owners absolute, to make it a total loss within the meaning of the contract.

Thomson vs. Ins. Co., 1 Maule & Selw., 30; 3 Kent Com. (12th ed.), 359; *Williams & Bruce Prac.*, 47; *Maude & Pollock on Ship*. (3d ed.), 44; The *Catharine*, 1 Eng. L. & Eq., 630; The *Elephanta*, 9 id., 554; *Pope vs. Nickerson*, 3 Story, 489.

Held, that the contract does not transfer the property, but only a claim upon it to be legally enforced.

Addison on Cont. (6th ed.), 275; Abbott on Ship. (11th ed.), 128; The *Tobago*, 5 Rob., 222; *Stainbank vs. Fenning*, 11 C. B., 88; *Stainbank vs. Shepperd*, 13 C. B., 44.

Held, that securities of this kind take effect in the inverse order of their dates, and take precedence of all others except those of salvors or sailors for wages.

The *Eliza*, 3 Hagg., 87; *Machlachlan on Ship*. (2d ed.), 5; The *Safford*, 1 Lush., 71; The *Priscilla*, 1 id., 5.

The lien attaches to the entire property, or to all that part of it which arrives in safety, or which can be saved, and the last plank of the ship or any part of the cargo may be sold by the bondholder for his benefit; the lender is entitled to be paid out of the effects saved, so far as they will go, in case of disaster.

The Catharine, 1 Eng. L. & Eq., 682; The Virgin, 8 Pet., 554; Broomfield vs. Ins. Co., Law Rep., 5 Exch., 196; 2 Marsh, 734; Stephens vs. Broomfield, 6 Moore, P. C., N. S., 161; Appleton vs. Crowninshield, 3 Mass., 463.

The insurer by an abandonment can have no greater rights than the insured whom he represents.

The Virgin, 8 Pet., 554; Ins. Co. vs. Davis, 8 S. & R., 138.

Held, that in order to defeat this lien the loss must be such that the vessel is utterly lost to the owner, and in case of wreck must no longer exist *in specie*. *Held*, that the vessel existing *in specie*, even though incapable of repair, there was not a total loss within the meaning of the bond.

Wilmer vs. Smilax, 2 Pet. Adm. R., 299; The Virgin, 8 Pet., 554; Ins. Co. vs. Davis, 8 S. & R., 138; 2 Phillips on Ins. (5th ed.), sec. 1170; Abbott on Ship. (11th ed.), 126; Bynk. Quæst. Pub., lib. 3, c. 16; Emerigon, tit. 5, art. 17; Ins. Co. vs. Archer, 3 Rawle, 226; 2 Arnould on Ins., by MacLachlan (4th ed.), 945; The Draco, 2 Sum., 157.

Delaware Mut. Safety Ins. Co. vs. Gossler et al., U. S. S. C., 8 Ins. Law Jour., 470.

See Cross Index at end of volume, for other cases bearing on BOTTOMRY BOND.

BROKER.

ABSTRACT OF THE LAW.

a. Whether the insurance broker is to be deemed the agent of the insured or of the company must be determined by his actual relations with the parties as evidenced by the facts. The general principle is that the broker who on his own responsibility, without any previous agreement with, or authority from the company, undertakes to solicit or place insurance, acts for the insured and not for the insurer.

Linford vs. Ins. Co., 34 Beav., 291; Lycoming Ins. Co. vs. Rubin, 8 Chi. Leg. News, 150; McFarland vs. Peabody Ins. Co., 6 W. Va., 425; McDawall vs. Fraser, 1 Doug., 260.

b. But any conduct on the part of the company or its agents, calculated to induce a belief on the part of the insured that the broker is clothed with authority, or such arrangements or understanding as cause him in reality to act in the interest of the insurer rather than the insured, will make him the agent of the insurer to the extent of such apparent authority.

Meadowcraft vs. Standard Ins. Co., 61 Penn. St., 91; Bodine vs. Exchange F. Ins. Co., 51 N. Y., 123; Sweeting vs. Pierce, 9 W. R., 343.

c. Payment to a broker, unless acting for the company, is not usually valid payment to the insurer. But an implied authority such as the possession of the policy under circumstances calculated to mislead the insured, or assent on the part of the insurer to such payment will render it valid, and such authority may be established by a custom or course of dealing.

Bethune vs. Neilson, 2 Calnes, 139; *Stewart vs. Aberdeen*, 7 L. J. (N. S.) Ex., 292; *Jell vs. Pratt*, 2 Stark, 67; *Russell vs. Bangley*, 4 B. & A., 396.

d. The broker, when acting for the insured, is entitled to a lien on the policy while in his possession, for premiums paid by him, and is responsible to the insured for losses chargeable to his fault.

Moody vs. Webster, 3 Pick., 424; *Mann vs. Forrester*, 4 Camp., 60; *Spring vs. South Carolina Ins. Co.*, 8 Wheat., 268; *Maydew vs. Forrester*, 5 Taunt., 615.

See further on this subject under AGENT.

DIGEST OF RECENT CASES.

BROKER—WHEN THE COMPANY IS RESPONSIBLE FOR ACTS OF.

1. A contract for insurance made by a street broker, and acted on afterwards by the regular agency, makes the broker an agent for the company so far as he has thus acted and his act has been adopted.

Mann, Receiver, vs. Meyer, Ill. S. C., 8 Ins. Law Jour., 905.

2. Notwithstanding a condition of the policy that any one other than the assured, obtaining a policy, shall be regarded as the agent of the assured, and not of the company, and that the policy shall not be binding until the premiums are actually paid, yet if the assured procures a policy through a street broker, supposing him to be an agent of the company, and pays the premium accordingly to him, and he fails to pay over the money to the company, the company will be held to have made him their agent by putting the policy into his hands for delivery, and the payment to him will bind the company.

Lycoming F. Ins. Co. vs. Ward, Ill. S. C., 90 Ill., 545; 8 Ins. Law Jour., 603.

3. The insurance was effected through a broker, to whom plaintiff company delivered the policies and who collected the premiums from defendant, but did not pay them over to plaintiff, and it was sought to recover the premiums from defendant, on

the ground that the broker was its agent under a clause in the policy which provides "that it is a part of this contract that any person, other than the assured, who may have procured this insurance to be taken by this company shall be deemed the agent of the assured named in this policy and not of this company under any circumstances whatever, or in any transaction relating to this insurance." The policy further acknowledged the receipt of the premium and provided that the company should not be liable until the premium should be actually paid. *Held*, that the insurer should be as strictly held as the insured, and the premium never having been paid, the policy did not attach and there was no consideration passed. *Held*, that where one of two innocent parties must suffer, it must be the party enabling the wrong to be done. *Held*, that defendant was not liable.

Empire City F. Ins. Co., vs. Howe Mach. Co., N. Y. Mar. Court, 9 Ins. Law Jour., 399.

WHEN THE COMPANY IS NOT RESPONSIBLE FOR ACTS OF.

4. A broker employed to procure, modify, or have a policy canceled, must be regarded as the agent of the insured, and his acts are the same as if done by the insured.

160 Eng. Com. Law, 381; 13 Wend., 518; 21 Wend., 279; Story on Agency, § 134-5, 451-2; 35 Barb., 463.

Where the policy was canceled under instructions of such broker, if not by mistake, it was final upon the parties.

Standard Oil Co. vs. Triumph Ins. Co., N. Y. C. A., 64 N. Y., 85; 5 Ins. Law Jour., 459.

5. The defendant employed S., an insurance broker, to insure certain property. The policy was delivered by the company to S., who received the premium, and failed to pay over the money to the plaintiff company, who sued and recovered judgment against said defendant. The point on appeal was, that inasmuch as the secretary of the company had given the policy to S., the broker, with instructions to collect the premium, he was made the agent of the company, and the condition of the policy as to the payment

to the broker was thereby waived. *Held*, that S. acted as agent of the insured, and the company was entitled to recover.

N. Y. Produce Exchange F. Ins. Co. vs. Welshofer, N. Y. Com. Pleas, 6 Ins. Law Jour., 558.

6. G., a broker, was accustomed to effect insurance with plaintiff company on hulls, cargoes, and freights for whom it might concern, payable to himself, giving his individual note for the premium, sometimes receiving the cash from his principals on delivery of the policy and sometimes charging the insured on his private account. The policies provided that in case of loss the amount of the premium note, if unpaid, and all sums due from the insured, should be first deducted. *Held*, that the acknowledgment of receipt of premium in a policy is only prima facie evidence which estops the company from alleging no consideration; but is not conclusive evidence of payment and may be contradicted by parol.

Goodspeed vs. Fuller, 46 Maine, 141; Bassett vs. Bassett, 55 Me., 127; 1 Phill. Ins. (5th ed.), § 515, and notes.

Held, that as a general rule, the premium note of an insurance broker, received by the insurers in payment of a policy for his principal, discharges the principal from liability to the insurers on account of the premium.

1 *Arnould Ins.*, §§ 61, 113, Perkins's note; 2 *Duer Ins.*, 297, 298; 1 *Pars. Mar. Ins.*, 503, 504, notes; *Patapsco Ins. Co. vs. Smith, 6 Har. & J., 166; Ford vs. Williams, 21 How., 287; Chandler vs. Ins. Co., 54 N. H., 561.*

But if the policy contain a provision that in case of loss the amount of the premium note shall be deducted from the insurance, the insured must submit to the deduction, although he has before paid the amount of the premium to the broker.

Hurlbert vs. Pacific Ins. Co., 2 Sumn., 471, 478.

In case of the death and insolvency of the broker, a court of equity will not compel his administrators to sequester for the benefit of the insurers any sum received by them from the insured on account of premiums, if the company held the broker's note therefor.

Milliken vs. Whitehouse, 49 Maine, 527; French vs. Price, 24 Pick., 13.

Union Ins. Co. vs. Grant et al., Me. S. C., 8 Ins. Law Jour., 33.

RIGHTS AND LIABILITY OF.

7. An insurance broker without having obtained the certificate required by the insurance law of Wisconsin of 1871, for companies seeking to do business in that State, solicited the insurance of one M., showing a list of companies in which he could place the insurance, among which were the companies in which the risk was placed. But the insurance was not solicited specifically for these companies. *Held*, that the act of placing the insurance in the companies rendered the broker their agent in the solicitation within the meaning of the statute, that whoever solicits insurance on behalf of any fire, etc., company, or transmits for any person other than himself an application for insurance, or a policy of insurance, to or from said company, shall be held to be the agent of such company. *Held*, that under the statute the agent was liable for each company for which the solicitation was made as a separate offense.

State of Wisconsin vs. Farmer, Wis. S. C., 9 Ins. Law Jour., 515.

8. A broker who undertakes to procure insurance for his principal and fails, is liable in case of loss, if he fails to give prompt notice of his failure.

Murray vs. Robinson, N. Y. S. C.

9. The plaintiff Fisher, a shipowner, who had on several occasions employed Skinner & Co. as insurance brokers to effect marine insurances for him, authorized them to insure a particular cargo shipped by him on a ship of his, and they effected certain policies in respect of the cargo in question by the sub-agency of the defendant, who was also an insurance broker, and who paid the premiums on the policies in this particular instance, as he had done in similar transactions before. The defendant knew throughout that Skinner & Co. were acting for the plaintiff, but the plaintiff did not know, until after the policies had been effected, that they had been effected otherwise than by the direct instrumentality of Skinner & Co. The course of business between Skinner & Co. and the plaintiff, was that Skinner & Co. should deliver to him a monthly account, debiting him with the

amounts due by him to them in respect of premiums and other charges for policies effected, and that the plaintiff should give bills at a month's date for the whole amount; and the amounts of the premiums actually paid by the defendant were in this way charged by Skinner & Co. to the plaintiff, and paid by him in the ordinary course, but the policies effected by means of such premiums were not then delivered to or demanded by the plaintiff. The defendant, who was aware of the usual course of business between Skinner & Co. and the plaintiff, retained the policies in his own hands, and debited the amounts of the premiums paid by him to Skinner & Co., but they failed to pay to him the amounts due, or to settle the account between them.

The plaintiff thereupon brought an action to recover the policies from the defendant, who claimed to retain them by virtue of a broker's lien upon them for the amounts of the premiums paid by him.

Held, that the general rule giving an insurance broker a lien upon policies for the premiums paid by him applied, and that there was nothing in the conduct of the defendant, or in his knowledge of the relations between the plaintiff and Skinner & Co., to disentitle him to set it up.

An insurance broker who is employed as a sub-agent to effect marine policies for another insurance broker, has the same rights of a lien as if directly employed by the principal.

Fisher vs. Smith, English Court of Appeals, 6 Ins. Law Jour., 720.

10. A shipowner at Barrow-in-Furness, was in the habit of employing a firm there to effect policies of marine insurance on his behalf, who were, in turn, accustomed to employ a firm of insurance brokers at Liverpool to effect insurances with underwriters. F. had duly paid his agents, who had, however, not paid over the money to the persons whom they employed. *Held*, that the person who had effected policies would be entitled for his labor and care and his money expended to a lien in the nature of holding possession of the policies, and he would be entitled to that lien against every person—against the owner of the goods for whose

benefit the policies were effected, and against any intermediaries who might have intervened between the owner of the goods and himself.

Fisher vs. Smith, Eng. House of Lords, 48 L. J. R. N. S., 465.

See Cross Index at end of volume, for other cases bearing on
BROKER.

BUILDER'S RISK.

DIGEST OF RECENT CASES.

1. The condition called a "builder's risk" must receive a reasonable construction, and one not repugnant to the nature and purpose of the contract, nor inconsistent with the due and customary use and enjoyment of the property.

James vs. Lycoming Ins. Co., U. S. C. C. Mass., 4 Ins. Law Jour., 9.

2. Where A. agreed to construct an addition to the house of B. for a gross sum, and the building was destroyed by fire while unfinished, through the fault of neither party, and there had been no acceptance by B. of what was done: *Held*, that B. having received no substantial benefit from what was done, the contract must be treated as an entirety and the loss must fall on A.

Filden vs. Besley, Mo. S. C., 9 Ins. Law Jour., 241.

See Cross Index at end of volume, for other cases bearing on
BUILDER'S RISK.

BUILDING.

ABSTRACT OF THE LAW.

a. The term building as applied to the policy includes everything connected therewith which constitutes an integral part of the structure, as the foundation and fixtures or appurtenances which are a necessary part.

Ewen vs. N. Y. Cent. Ins. Co., T. & E. (N. Y.), 213; Blake vs. Exc. Mut. Ins. Co., 12 Gray (Mass.), 265.

b. But it does not usually include fixtures not a part of the realty, or trade fixtures, or materials intended for construction.

Workman vs. Ins. Co., 2 La., 507; White vs. Mut. F. Ins. Co., 8 Gray (Mass.), 566; Hood vs. Manhattan Ins. Co., 1 Ker. (N. Y.), 532.

Where the destruction of the building is approximately due to a conflagration the insurer is liable.

Greenwald vs. Ins. Co., 3 Phil., 323; *City Fire Ins. Co. vs. Corlies*, 21 Wend., 867; *Thompson vs. Ins. Co.*, 6 U. C., 319.

c. But the policy is not liable for the destruction of the building by fire which takes place after it has fallen.

Nave vs. Home Mut. Ins. Co., 37 Mo., 430.

See further on this subject under ADJACENT BUILDINGS, DESCRIPTION, LOSS, MEASURE OF DAMAGES, POLICY, RISK, REPAIRS, REPLACEMENT, VACANT, USE.

DIGEST OF RECENT CASES.

BUILDING—FALL OF.

1. The policy provided that if the building should fall, except as the result of fire, the insurance should cease. The building was blown partly off the posts on which it rested, was leaning out of plumb, and so far unfit for occupancy that most if not all of the movable furniture was taken out. *Held*, that inasmuch as it remained united, was not reduced to a mass of rubbish, and though in a greatly damaged condition could have been repaired, the building had not fallen within the meaning of the policy. The question whether it had fallen, was one of fact.

Nave vs. Home Mut. Ins. Co., 37 Mo., 431, and *Boyd vs. Dubois*, 3 Campbell, 133, distinguished.

Where the agent knew the condition of the building, and allowed the policy to remain uncanceled, it is too late after the loss to allege that the risk was rendered more hazardous.

Firemen's Fund Ins. Co. vs. Congregation Rodolph Sholem, Ill. S. C., 80 Ill., 558; 5 *Ins. Law Jour.*, 489.

2. The policy provided that if the building should fall, except by fire, the insurance should cease; also that it should be void if any change occurred in the building by which the risk was increased, without the written consent of the company. A portion of the building, which was of brick, fell, but more than three-fourths remained standing, and two days subsequent a fire occurred in an adjacent building, by which the first building and contents were damaged. *Held*, that it was not a fallen building within the mean-

ing of the policy. *Held*, that the change referred to was only such as might be produced by the act of the insured, to which the company might consent, not the accidental fall of a portion.

Breuner vs. L., L. & G. Ins. Co., Cal. S. C., 51 Cal., 101; 6 Ins. Law Jour., 475.

3. The manifest intent and purpose of a clause in a fire insurance policy that, "if a building shall fall, except as the result of a fire, all insurance by this corporation on it, or its contents, shall immediately cease and determine," is that the insurance, whether upon a building or its contents, shall continue only while the building remains standing as a building, and shall cease when the building has fallen and become a ruin. When substantially all the floors and roof of a building used as a store-house fall, leaving nothing standing but the outer walls and perhaps a stair-case or an elevator, the building must be deemed to have fallen.

Distinguishing Firemen's Ins. Co., vs. Congregation Rodelph Sholem, 80 Ill., 558; Breuner vs. Liverpool & London & Globe Ins. Co., 51 Cal., 101.

Huck vs. Globe Ins. Co. et al., Mass. S. J. C., 127 Mass., 306; 8 Ins. Law Jour., 912.

4. It appeared that the plaintiff had recently purchased a public house for the sum of £4,000 or £5,000; and the premises adjoined a cotton mill of the defendant Longshaw. On the 14th of December a fire broke out in Longshaw's mill, by which it was completely consumed, the fire also to some extent damaging the plaintiff's premises. The latter were insured for £3,000 with the defendant company. After the fire a wall adjoining the plaintiff's house was left standing in a very dangerous condition. On the 15th an agent of the insurance company warned Longshaw of what probably would happen unless he took some precautions to prevent it falling. A builder at Pendleton was employed to secure it, but nothing, it was alleged, had been done to it previous to the 22d, when a violent gale coming on, the wall fell over on the plaintiff's premises and completely destroyed the building. The insurance company paid £20 into court, and during the course of the trial another £20, which, it was submitted, covered the damage directly done by the fire.

Held, that the damage sustained by the fall of the wall was not such damage as they were liable for under the policy.

Gaskarth vs. Law Union F. Ins. Co., Manchester (Eng.), Civil Court, 6 Ins. Law Jour., 159.

DESTRUCTION OF, TO ARREST FIRE.

5. At common law every one had the right to destroy property when necessary to check a conflagration. Where such destruction was authorized by statute and confided to certain officials, and it was further provided that the city should in such case be liable for the damage. *Held*, that the destruction must be done clearly within the statute to enforce the liability.

Bowditch vs. City of Boston, U. S. S. C., Mass.

6. An ordinance of the defendant, a municipal corporation, authorized the mayor to order the destruction of any buildings he might deem necessary to arrest the progress of a fire. In virtue of this authority, the mayor ordered the destruction of two buildings belonging to plaintiff. This action was alleged by plaintiff to be without sufficient cause, as they would not have been burned by the fire, nor was the fire extinguished or arrested by tearing them down. Compensation was therefore demanded of defendant for their value.

Held, that municipal corporations, whose officers are by statute and by ordinance authorized to order the destruction of any building or fence, "when they shall deem it necessary to arrest the progress of and extinguish" a fire, are not liable to the person whose property is thus destroyed in the absence of a statute creating such liability.

The destruction of buildings, etc., under such circumstances is not a taking of private property for public use within the meaning of Section 18 of Article 1 of the Constitution, but is a regulation of the right which individuals possess to destroy private property in case of necessity, to prevent the spreading of fire or other great calamity.

The legislature cannot authorize the taking of private property

for public use, except upon first making or securing just compensation therefor, and any statute professing to do so would be void and confer no authority to that end.

Field vs. City of Des Moines, S. C. Iowa, 4 Ins. Law Jour., 237.

GENERALLY.

7. Where the policy contained no stipulation regarding alterations, the detachment of the central portion of a building and its addition to one of the two ends, thereby making two structures, does not avoid the policy, provided the risk is not increased.

Dorn vs. Germania Ins. Co., U. S. C. C., 5 Ins. Law Jour., 183.

8. Where the insured was required in the application to state the distance, etc., of buildings within a distance of one hundred feet, if the distance of a building not mentioned was less, the burden was on the insurer to prove the fact. In the absence of such proof the presumption is that the distance is greater.

Wright vs. Hartford Ins. Co., Wis. S. C., 36 Wis., 522; 4 Ins. Law Jour., 251.

See Cross Index at end of volume, for other cases bearing on BUILDING.

BURDEN OF PROOF.

See EVIDENCE, PLEADING.

See Cross Index at end of volume, for cases bearing on BURDEN OF PROOF.

CANCELLATION.

ABSTRACT OF THE LAW.

a. Without special stipulation neither party to a contract can cancel without the consent of the other.

Sands vs. Hill, 42 Barb. (N. Y.), 651; *Atlantic Ins. Co. vs. Goodall*, 35 N. H., 328.

b. The right can only be exercised in strict accordance with the terms of the contract.

Peoples' M. E. F. Ins. Co., 9 Allen (Mass.), 319.

c. Cancellation to be effectual requires sufficient notice that the policy is canceled—notice of future action is not sufficient—also the tender of unearned premium.

Peoria F. & M. Ins. Co. vs. Botto, 47 Ill., 516; *Ætna Ins. Co. vs. Maguire*, 51 Ill., 342; *Landes vs. Home Ins. Co.*, 56 Mo., 501.

d. Payment of unearned premium to a party not authorized to receive it, or simply credited on the books of the company, is not sufficient.

Van Valkenbergh vs. Lennox Ins. Co., 51 N. Y., 465; *McLean vs. Republic Ins. Co.*, 3 Lans. (N. Y.), 421.

e. The insured must have reasonable opportunity of insuring elsewhere.

Home Ins. Co. vs. Heck, 56 Ill., 111.

f. Cancellation is not effectual in the presence of an impending peril insured against.

Home Ins. Co. vs. Heck, *supra*.

See further on this subject under AGENT, POLICY.

DIGEST OF RECENT CASES.

CANCELLATION—WHAT IS EFFECTUAL.

1. The insured on learning that the M. Ins. Co. had suspended, surrendered his policy to the agent, received the unexpired premium and took out a policy in another company. Nothing more was heard of the first policy. In an action on the second policy, *Held*, that the first must be considered canceled from the time of its surrender.

Hadley vs. N. H. Fire Ins. Co., *N. H. S. C.*, 55 *N. H.*, 110.

2. The insurance was procured in the name of the owners by

their agent, who paid the premiums, and was allowed entire control of the property, collecting and using the rents in his own way. He gave his note for the premium, which being unable to pay when it became due, he agreed to have the policy canceled *ab initio*, and claiming that it was mislaid, signed a written release. In a suit for recovery under the policy by the owner: *Held*, that authority to cancel as well as to effect the insurance was within the apparent scope of the agent's authority.

Gatti vs. People's Ins. Co. of Memphis, Shelby Co., Tenn., Circuit Court, 9 Ins. Law Jour., 158.

3. The policy authorized the company to terminate it at any time by giving notice of cancellation to the insured. *Held*, that neither a return of the policy nor a written notice was necessary. *Held*, that a statement by the agent that upon the return of the policy he would cancel it, or a mere wish expressed by the company to have it canceled, would not be sufficient notice of cancellation. *Held*, that if the action or language of the agent conveyed to the insured a knowledge of the cancellation by him at that time, this was sufficient notice. *Held*, that the effect of what was said and done between the parties, may properly be a question of fact for the jury.

Grace vs. Amer. Cent. Ins. Co., U. S. C. C., N. Y., 8 Ins. Law Jour., 95.

4. M. insured with the S. company for three years from September 15, 1874, giving his note September 22, 1874, at three months, for the premium of \$180. The policy contained a stipulation that for any cause "it shall be optional with the company to terminate the insurance after notice given to the assured or his representative of their intention to do so; in which case the company shall refund a ratable proportion of the premium." In it was inserted this provision: "Loss, if any, payable to the R. B. and L. Association No. 2, as their interest may appear." The premium note was protested for non-payment. On March 19th the company canceled the policy, with notice to the R. B. and L. Association, the holder thereof. On December 13-14, 1875, the property was destroyed by fire. In the meantime the insurance company had dissolved, and Mr. L., the

former president, was the only person authorized to act for it. On him defective proofs of loss were served, and from his failure to object to their sufficiency, plaintiff inferred waiver of the defects. *Held*, notice to a representative of the assured—the holder of the policy—of the cancellation was sufficient, and the cancellation took effect from the service. The protested note was not cash, but the evidence of a broken promise to pay the premium which the assured had no right to until payment of the earned portion of the premium, and there was nothing of which to refund a ratable proportion. Where no word or action has been said or done by the assurer to mislead the insured or throw him off his guard, mere silence is not enough to infer a waiver.

Beatty vs. Lycoming Ins. Co., 16 P. F. Smith, 9.

Southside F. Ins. Co. vs. Mueller, Pa. S. C., 8 *Ins. Law Jour.*, 260.

5. Plaintiff having insurance in a Chicago company on certain property for five years from February 14, 1874, for which he had paid the premium in full, procured from the defendant a policy of insurance for three years on the same property for the same amount, dated January 5, 1875, paying the premium therefor, and delivering to defendant the Chicago policy with an indorsement requesting the Chicago company to cancel it, and this policy thus indorsed, was immediately mailed by defendant's agent for the plaintiff to the Chicago company. The property was destroyed by fire March 19, 1875, and afterwards plaintiff received a notice from the Chicago company dated January 10, but postmarked March 20, 1875, that it refused to cancel the policy. *Held*, that said policy had been canceled by plaintiff on his part; that the Chicago company, by its silence for two and a half months and until after the property was destroyed, was estopped from denying that it had assented to the cancellation; and that defendant is liable for the loss, even if the validity of its policy depended upon such cancellation.

Walters vs. St. J. F. and M. Ins. Co., *Wis. S. C.*, 39 *Wis.*, 489. •

WHAT IS NOT EFFECTUAL.

6. Mere notice, without giving up the policy, cannot amount to a surrender. Giving up a policy to a stranger and notifying the agent of the fact is not a surrender. The policy should have been transmitted to the agent or principal.

American Ins. Co. vs. Woodruff, Mich. S. C., 34 Mich., 6.

7. The owner of a boat, holding a time policy thereon, having several months to run, the amount of which has been impaired by a partial, but unadjusted loss, desiring to have his insurance restored to the original amount, with increased time and privileges, proposed to the underwriters to cancel the old policy and issue a new one for the former amount, with longer time and additional privileges, requesting them to send a new policy, and offering to remit the increased premium arising from these charges. *Held*, that this was a proposition to continue the insurance with modifications of the existing policy, and must be accepted or rejected as an entirety. It did not authorize the insurers to cancel existing insurance and credit unearned premiums on outstanding premium notes, without the assent of the insured.

Parsons on Mercantile Law, ch. 11, sec. 11; Chitty on Contracts, pp. 11 to 20.

Walker vs. Tobacco Ins. Co., O. S. C. C., 30 Ohio, 317.

8. The insured employed N., an insurance broker, to procure the insurance, who in turn employed A., also a broker. The policy was obtained by A., and his name was indorsed on it as the agent receiving it. The policy contained the following provision: "This insurance may be terminated at any time at the request of the assured. * * * The insurance may also be terminated at any time at the option of the company on giving a notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy. It is a part of the contract that any person other than the assured who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company under any circumstances whatever, or in any transaction relating to this insurance." Shortly after, the company notified N. of their election to cancel. N. accepted the notice and prom-

ised to return the policy. The property was destroyed on the following night before the insured had learned of the cancellation. *Held*, that the object of the clause was to provide for a method of terminating the insurance, and the intention of the parties was that a notice to the party procuring the insurance should be sufficient for that purpose. *Held*, that evidence of a universal custom to notify the broker procuring the insurance was admissible to show the intention of the parties in the language used. *Held*, that where the evidence of such custom was positive and uncontradicted, it was unnecessary to submit to the jury whether the custom has been proved. *Held*, that evidence of an understanding that the notice in such cases does not take effect until a reasonable time, was rightly rejected as tending to vary the contract. *Held*, that A. was the only person known to the company in the transaction; the acceptance of the policy by the insured was a ratification of his act, and he was the person who procured the insurance within the meaning of the policy.

Grace et al. vs. Am. Central Ins. Co., U. S. C. C. N. Y., 8 Ins. Law Jour., 731. •

9. The policy in the H. company on a summer hotel was procured by R., as agent of insured through C., the agent of the company. Afterwards the company instructed C. to procure a diminution or cancellation of the risk. Thereupon C. wrote to R., proposing a reduction or cancellation, and offering to place the risk in the L. company or return the premium. R. answered he did not wish the risk divided, but the policy might be canceled, the whole risk put in the L. company, and the unexpired premium applied to the reinsurance, and the policy was enclosed for the purpose. C. upon receipt of the policy marked it canceled, but did not place the risk in any other company, but placed the policy with the return premium in a safe, intending to take them to R. on the next day. But he failed to go, and the property burned, neither R. nor the owner knowing that the property was not reinsured. The owner had no knowledge of and had given R. no authority to negotiate for the cancellation other than that implied in the agency to effect insurance. The policy stipulated that it might be terminated upon notice and a return of the un-

expired premium. The premium was sent by C. to R. after the fire, who refused to accept it. *Held*, that the agreement was to cancel coupled with a reinsurance, and it had not been complied with by C., therefore the H. company could not insist upon the cancellation; there had been no agreement of parties.

Pars. on Contracts, 6.

Held, that the premium had not been returned in compliance with the policy provision. *Held*, that whether C. acted as agent of one company or both in the matter was a question of fact and not of law.

Poor vs. Hudson Ins. Co., U. S. C. C. N. H., 9 Ins. Law Jour., 428.

10. This is an action on an open river policy. It was proved that the corn lost on the *Lizzie Gill* in January, 1870, was worth the amount claimed by the plaintiff. The defense is that the insurance did not attach to this consignment, because plaintiff failed to make returns of certain produce received by him previously, as required by the condition as contained in the contract annexed to the policy. It seems that, without the knowledge of plaintiff, his clerk, whose duty it was to make returns to defendants of all shipments covered by the policy, neglected to report certain consignments of produce which were made to plaintiff in August and December, 1869. Defendants were aware of this but continued to do business with plaintiff until the 16th March, 1870, when the policy was canceled, receiving in the meantime premiums amounting in the aggregate to \$3,999.27. From this statement of facts there flow two propositions which seem to be inevitably correct: First, if the breach of contract now complained of *ipso facto* avoided it, respondents should return to plaintiff the premium received subsequent to said avoidance. Second, if the contract of insurance was voidable on account of delinquencies of plaintiff in August and December, 1869, and respondents, with full knowledge thereof, delayed canceling the policy until the 16th of March, 1870, receiving thereunder a large amount of premiums in the meantime, respondents should be held liable for the losses which occurred during the same period.

Powell vs. Mech. & Traders' Ins. Co., La. S. C., 28 La., 19.

11. Where it was claimed that notice of cancellation was given to the agent, who issued the policy, and who was claimed to be acting for the insured, but it was not claimed that any notice was given to the insured, and that the premium was received by the company from the agent, but was afterwards made up to him, and there was a conflict of evidence on all these points, the question of the true nature of the transactions and the relation of the parties was for the jury.

Roger Williams Ins. Co. vs. Carrington, Mich. S. C., 9 Ins. Law Jour., 577.

12. The policy provided that it might be canceled for "misdescription, increase of risk, erection of new buildings, etc., or any other cause." *Held*, that the company had no power to arbitrarily cancel. The cause must be of the kind specified in the conditions.

Wilson vs. Franklin F. Ins. Co., N. Y. C. P.

13. Where a policy of insurance reserves no power of cancellation, it cannot be canceled at the option of the company, and evidence that the agent of the insuring company gave notice that the policy was canceled, and requested its return, does not show a cancellation where it does not appear that the insured assented, or that the person to whom the notice was given, was the agent of the insured. An agency to procure insurance is ended when the insurance is procured and the policy delivered to the principal; and the agent employed to procure the insurance has no power, after the policy is delivered to his principal, to consent to a cancellation.

Rothschild vs. Cent. Ins. Co., St. Louis, Mo., C. A., 7 Ins. Law Jour., 639.

14. Plaintiff, through an insurance broker, procured a policy from the agent of a fire insurance company. Plaintiff paid the broker the amount of premium, but the agent gave the broker credit. The company informed the agent that it would not accept the risk on plaintiff's building, but the agent said nothing to plaintiff. Thereafter plaintiff, desiring to make some alterations in the building which would increase the risk, applied to the agent to indorse on the policies permission to do so. The agent said it

would be necessary to apply to the company, and he took plaintiff's policy to send to the company for such permission. The agent sent the policy, informing the company of the facts. The company kept the policy to cancel it, but gave no notice to that effect. Subsequently the building was burned. In an action on the policy; *Held*, that the company was estopped from claiming that the policy was not in force.

The policy required that in case of loss, plaintiff should give notice forthwith in writing to the company. The plaintiff told the agent of the loss, who wrote to the company, which claimed not to be liable on the ground that the policy never had been in force. *Held*, that the company could not thereafter set up informality in giving notice, etc., of the loss.

A defense that the plaintiff had, in violation of the terms of the policy, increased the risk; *Held*, not available unless set up in the answer.

Bennett Admr, vs. Maryland F. Ins. Co., U. S. D. C., N. D. N. Y., 7 Ins. Law Jour., 556.

15. A policy stipulating for cancellation upon payment of unearned premium, can only be canceled upon such payment, unless there has been an independent contract and meeting of the minds of the parties to cancel, in which case such payment is unnecessary as a prerequisite. The insured may by his words or action waive such payment as a prerequisite.

Kirby vs. Phoenix Ins. Co., Shelby Co. Tenn., Circuit Court.

GENERALLY.

16. Where the policy provided that it might be canceled at the option of the insured, and the secretary upon inquiry informed an agent of the insured that it was not necessary to send on the policy for an indorsement of the assignment, the insured was left in the condition of having the policy terminated without the refunding of the premium, if a requirement that consent to the assignment should be enforced. *Held*, that this act of the secretary was a waiver of the required indorsement.

Stolle vs. Aetna F. & M. Ins. Co., W. Va. S. C. A., 10 W. Va., 546.

17. The original policy was surrendered on account of an error and another issued in its place by the agent with special permits, which he was authorized to do. *Held*, that the neglect of the agent to report the cancellation and permits was no evidence of collusion.

Germania F. Ins. Co. vs. McKee, 94 Ill., 494; 9 Ins. Law Jour., 350.

See Cross Index at end of volume, for other cases bearing on CANCELLATION.

CAPITAL STOCK.

DIGEST OF RECENT CASES.

CAPITAL STOCK—WHAT IS AND IS NOT A VALID SUBSCRIPTION OR INCREASE.

1. The original capital was \$100,000. In accordance with a provision of the articles of association that it might be increased to \$1,000,000 it was afterward increased to \$500,000. But the general law of Missouri regarding corporations only allowed an increase to double the original amount. The complainant purchased stock after \$200,000 of stock had been issued. Subsequently an act was passed reciting that whereas the increase had been in good faith, the capital stock is, and the same is hereby declared to be \$500,000, and that the act should take effect and be in force from and after its passage. *Held*, that the act legalized the issue, and the complainant was liable on his stock in a suit by the assignee of the company in bankruptcy.

Farrar vs. Walker Ass. of N. Mo. Ins. Co., U. S. C. C., E. D. of Mo., 6 Ins. Law Jour., 483.

2. A premium note given for subscription to the capital stock of an insurance company to be paid "when the list is completed as per apportionment," cannot be collected until the whole ap-

portionment has been subscribed for. The list must have been completed before commencement of suit.

McCann vs. American Central Ins. Co., Neb. S. C., 6 Ins. Law Jour., 445.

3. A statute prohibiting insurance corporations from "taking risks" or transacting any "business of insurance" except upon certain conditions, does not, even when such conditions are not complied with, invalidate subscriptions made to the capital stock of such corporations, or notes given in payment thereof.

Bartlett vs. Chouteau Ins. Co., Kan. S. C., 6 Ins. Law Jour., 815.

4. The capital stock of the plaintiff, a fire insurance company, having become impaired, the stockholders were required, by the superintendent of insurance, to make up the deficiency. It was arranged between certain of plaintiff's officers and P. & Co., private bankers, P. being also plaintiff's president and one of its directors, that the stockholders should give their notes for the amount required, which were to be taken by P. & Co., and plaintiff given a cash credit therefor—such credit, however, not to be drawn upon any faster than the notes were paid; the makers were not to be called upon for payment unless the exigencies of the company absolutely required, and unless voluntarily paid, that they were to be paid out of dividends. Notes were executed in pursuance of the agreement, payable at P. & Co.'s bank, to the order of the makers, and indorsed by them; they were delivered to plaintiff's officers and by them delivered to P. & Co., who credited them to plaintiff and charged to discounted bills. On plaintiff's books they were charged to P. & Co. as cash. P., as president, and plaintiff's vice-president, made affidavit that an amount, which included that so credited, had been realized in cash, and was absolutely held by plaintiff subject to no lien or claim, which affidavit was forwarded to the superintendent; and afterwards a report, under oath, was made to him, stating that the stockholder's notes had been paid in cash to plaintiff and amount deposited in bank, without any conditions or reserve, and thereafter the superintendent, upon the strength of the report and the assurance of the plaintiff's officers, certified that his order

had been complied with. Plaintiff's board of directors never took any action in reference to the notes. In plaintiff's annual report for 1874, the credit thus obtained was reported as cash on deposit. In June, 1874, P. & Co. pledged the notes to defendant as collateral, and some time after that failed, owing plaintiff a large amount. In an action to recover the notes; *Held*, that plaintiff never had title to them; it had no right to take them and never authorized the taking; its officers, in making the arrangement and taking the notes, were not acting, and had no authority to act, for it, but acted as agents of the stockholders; also, that if plaintiff took title, it parted therewith to P. & Co. No formal authorization of its board of directors was necessary for that purpose; its managing officers could negotiate the notes without such action; and that, therefore, the complaint should have been dismissed.

Bl. R. Ins. Co. vs. N. Y. T. L. and T. Co., N. Y. C. A., 73 N. Y., 282.

5. A subscription to stock on which payment was refused because full amount agreed on was never subscribed, is binding if a present agreement to pay notwithstanding any unexpressed condition. If the parties procuring the subscription were agents of the company subscribers are bound, but if they acted independently and the subscriptions were not the property of the company nor to be given them until complete, otherwise.

Brewers' F. Ins. Co. vs. Clausen, U. S. C. C., N. Y., 3 Ins. Law Jour., 919.

6. Where an alleged stockholder in an insurance company deposits with the company in payment of his subscription valuable securities, for the purpose of having the same reported by the company as part of their assets, and of exhibiting the same to the Insurance Commissioner as such, and they are so reported and exhibited, he is estopped from denying the validity of his subscription to the stock, and from recovering back the securities because of the invalidity thereof.

Nor can he allege any informalities in the organization

of the company, or that his subscription was conditional merely.

Commonwealth vs. Manufacturers' Ins. Co., C. P. Dauphin Co., Pa., 4 Ins. Law Jour., 800.

7. A note given to a mutual insurance company "to increase the capital stock," cannot be sued on and treated as a premium note. An assessment by the company is not evidence of the money due on such note. It must be averred that there was a resolution under proper authority to increase the capital stock, and that it was so increased. Where the property belonged to a manufacturing company in which insured was a stockholder, there being no authority in the company's charter to insure against losses on stock; *Held*, that there was no insurable interest.

Penn. Central Ins. Co. vs. Gayman, C. P. Dauphin Co., Pa., 5 Ins. Law Jour., 319.

LIABILITY OF STOCKHOLDERS FOR SUBSCRIPTIONS.

8. The transferee of stock on the books of an insurance company, on which only twenty per cent has been paid, stands in the place of an original subscriber, and is liable for calls for the unpaid portion made during his ownership, without proof of any express promise by him to pay such calls.

Cases of Fort Edward & Fort Miller Plank Road Co. vs. Payne, 17 Barb., 557; Kennebec & Portland R. R. Co. vs. Payne, 31 Me., 470; Canal Co. vs. Sassom, 1 Binney, 70; Palmer vs. Ridge Mining Co., 34 Pa. State, 288; Seymour vs. Sturgess, 26 N. Y., 134, distinguished.

Upton vs. Tribilcock, U. S. S. C., Oct. Term, 1875; Bond vs. Susquehanna Bridge, 6 Har. & Johnson, 128; Hall vs. U. S. Ins. Co., 5 Gill, 484; R. R. Co. vs. Boorman, 12 Conn., 530; Haddersfield Canal Co. vs. Buckley, 7 T. M., 36; Angell & Ames on Corp., § 534; Redfield on Railways, 53, §§ 7-9.

Such transfer may be made at the request of the vendor, and the buyer becomes responsible for subsequent calls.

3 De Gex & Small, Ch. 310.

Webster vs. Upton, assignee, U. S. S. C., 5 Ins. Law Jour., 587.

9. In an action upon a bond for the payment of the price of stock subscribed for in an insurance company, the liability of the

defendant is to be measured and governed by the terms of his contract. Where the stock subscribed for is, by the contract, to be paid for as follows : five per cent on receipt of stock certificate ; five per cent in three months from date of contract ; five per cent in six months from such date ; five per cent in nine months from such date ; and the balance "being subject to the call of the directors, as they may be instructed by the majority of the stockholders represented at any regular meeting," no action will lie to recover, where the first twenty per cent has been paid, unless upon a call of the directors ; or, where the corporation has become bankrupt, and its affairs are being wound up in a court of equity, the court must find and fix the per cent necessary to be assessed upon the stock for the purpose of paying the debts of the corporation, and must make, or cause an assessment to be made upon the shares of the stockholders. Where this is not done, no action will lie to recover the eighty per cent of the stock unpaid.

Chandler, receiver, vs. Keith, Iowa S. C., 5 Ins. Law Jour., 84.

10. The charter of an Illinois company provided that the stockholders should be individually liable for their unpaid installments in case of loss before all the stock was paid in : also that the charter might be amended or repealed. The general insurance law, subsequently passed, provides that the corporators of any company organized under the act should be severally liable to the amount subscribed by them until the whole amount of capital had been paid up ; also that all pre-existing companies should be subject to its provisions, except that the amount and character and investments of their capital, and the privileges and powers granted them, should remain as authorized by their charters. *Held*, that unlimited power was reserved to alter or repeal the original charter. *Held*, that the liabilities imposed by the general law on corporators applied to this company. *Held*, that until the stock was all paid up, the corporators were severally liable for the company's debts to the amount of their subscriptions, even though their subscriptions had been paid in full.

Butler vs. Walker, Ill. S. C., 5 Ins. Law Jour., 335.

11. A bill was filed by stockholders against the company, alleging collusion and fraud on the part of the officers, they having,

in 1869, subscribed for and taken a large number of shares, (5,500,) and paid for them in the usual way, were afterward permitted to surrender all said shares, and withdraw from the company all the money and assets that they had paid therefor, and also to withdraw other assets or funds of the company, and appropriate them to their own use—that afterward a receiver was appointed for the company, etc. The answer was that the defendants only held the 5,500 shares as a loan for money advanced as security for the loan. Bill dismissed. It appeared that the 5,500 shares were held out to other stockholders as on the same footing as other *bona fide* subscriptions; and were counted in as assets of the company; and an auditor's certificate obtained on a showing so representing these shares as subscribed for in the usual way. *Held*, that the presumption is that all subscriptions stand on the same basis, and all shares are entitled to the same benefits, and subject to the same burdens, and in the subscription of each person, every other subscriber has a direct interest. And where there purports to be an amount of stock taken, when in fact it has not been taken, but issued to individuals under a private agreement that they may at pleasure surrender the shares and take back their money, such an arrangement is a fraud in law, even though it may not have been intended as a fraud, and it will be disregarded, and the parties held bound to all the responsibilities of *bona fide* subscribers. It was contended that a party has a right to make any condition he pleases to a subscription, provided the condition is expressed in the contract; that what he is forbidden to do, is, to make an unconditional subscription, accompanied by a secret stipulation, written or parol. *Held*, that the present case does not come within that rule, because here certificates of stock were issued in the usual form, and the issue appears on the books of the company as a regular issue, unaccompanied by any sign of a condition. They showed the stock taken to be real, *bona fide*, absolute issue of shares. And other stockholders were entitled to rely upon the certificates and book entries, and are not to be held bound to go back and take notice of any antecedent individual contract existing between the directors and the takers of the shares—and so the transaction stands as an unconditional subscription controlled by a secret agreement em-

bodying conditions. Nor are shareholders bound to look into the management of the affairs of the company, and will not be held to have notice of everything which has been done by directors; who may be assumed by the stockholders to have done their duty. Nor need other stockholders, to show that such a subscription deceived them, and influenced them to subscribe for shares. The transaction being in itself fraudulent, will be disregarded, whether any one was influenced by it or not. Nor will the stockholders be estopped by the fact that they met and approved the course of management while the particular facts of the secret transaction were unknown to them. And if a committee is appointed to collect the assets of the company, to ascertain whether business should be suspended, this committee is confined to the purpose of the appointment. They have authority to collect the assets, but not to give them away, or release them without payment. Nor will a delay of two years be regarded as laches in such case.

Melvin vs. Lamar Ins. Co., Ill. S. C., 6 Ins. Law Jour., 490.

12. Stockholders may be assessed under a subsequent act, although the company's charter exempts them, if the right to pass such subsequent act is reserved in the charter.

Gardner vs. Hope Ins. Co., R. I. S. C., 9 R. I., 194.

13. *Stock Notes*.—Where a call for money or subscription is to be made by the directors, such call must be shown to have been made in order to recover. Stock notes are only to be used to indemnify the creditors, as such subscriptions are for their security, and a stockholder is not legally bound to pay more of his subscription than is necessary for this purpose. The declaration should show the amount of the deficit.

Barrett vs. Alton and Sangamon R. R. Co., 13 Ill., 504. Case of White vs. Smith, 77 Ill., 354, distinguished.

Lamar Ins. Co., vs. Moore, Ill. S. C., 7 Ins. Law Jour., 747.

14. *Held*, that the stockholders of an insurance company, organized under the general law of 1869, are liable for the debts of the company to the full amount of their respective shares of stock, when the full amount subscribed has not been paid in; and a stockholder is not relieved of this liability by payment of

the stock subscribed by him. Until the full capital stock is paid in, and a certificate of the fact made and recorded, he is liable to be sued for the debts of the company to the amount of his stock.

Butler vs. Walker, 80 Ill., 345.

Held, that although the company had a special charter, yet increasing its capital stock under the general law was, in effect, an incorporation under the general law, and subscribers to the stock incurred the liabilities imposed by that law. *Held*, that the bankruptcy of the insurance company does not affect the right of recovery against the stockholder.

Tibbals vs. Libby, Ill. S. C., 7 Ins. Law Jour., 763.

15. The 16th section of the general insurance law provides that "the trustees and corporators of any company organized under this act shall be severally liable for all debts or responsibilities of such company, to the amount by him or them subscribed, until the whole amount of the capital of such company shall have been paid in, and a certificate thereof recorded as hereinbefore provided." *Held*, that the word corporator as used above, means a shareholder and not simply a commissioner or promoter in organizing the company; That section 19 of the above act imposes the same liability on shareholders in companies organized under special charters, and brought under the provisions of the general law as those originally organized under the general law, except in cases where the general law otherwise provides. One of these exceptions is, that their capital may continue the same as authorized by their charters, both in character and amount; That the company had a special charter and it was not necessary for it to take the preliminary steps to form a corporation under the general law, but it was its duty, when coming under the general law, to make a report to the auditor of the fact of organization, and amount of capital paid in, etc. If the capital had been collected and invested as authorized by the charter, in the securities named, the company should have so reported, thus affording security to that extent to the creditors of such company. To insure a compliance with this requirement the stockholders

were made liable by the statute, until the certificate should be obtained and recorded, as required by Section 16.

Dissenting from Chase vs. Lord, 6 Abbt. N. C., 268, 16 Hum., 369.

Gulliver vs. Roelle, Ill. S. C., 10 Ins. Law Jour., 537.

16. The plaintiffs recovered judgment against the company for a loss, and no property being found on execution, a petition was filed against the stockholders individually seeking to charge them as contributors to double the amount of their stock, or to the extent necessary to pay their judgment, under the Ohio statute making the stockholders individually liable in double the amount of their stock. The policy provided that action must be commenced within twelve months after the loss. *Held*, that the limitation does not apply to suits against the individual stockholders.

Held, that where parties subscribed in their own name, and not as trustees, they are liable to contribute as stockholders though they may in fact hold the stock for another.

10 Metcalf, 545, and cases cited in Lindley on Partnership.

A. T. Stewart & Co. vs. Trimble Ins. Co., D. C., *Hamilton Co. O.*, 5 Ins. Law Jour., 636.

17. A company may make a valid compromise with a subscriber to its stock relative to payment of his shares. But such compromise will not affect the rights of previous creditors. Where, however, the shares have been canceled, subsequent creditors cannot claim against the subscribers.

In re Norwich Prov. Ins. Soc., Eng. Supreme Court of Judicature.

GENERALLY.

18. The unpaid capital is a trust fund, secured to creditors, and cannot be set off for a debt.

Sawyer vs. Assignees of Ins. Co., U. S. S. C., 3 Ins. Law Jour., 301.

19. Under the statute of Illinois an insurance company may exercise the powers conferred upon it by its charter, independent of the general law, and if its charter allows it to do business with a

capital stock of not less than \$50,000, or more than \$300,000, it may reduce its capital stock to \$100,000 at any time, and not lose its power to do business where the general law requires a capital of \$150,000. Nor does a change of name affect its rights.

People vs. Empire Ins. Co., Ill. S. C., 7 Ins. Law Jour., 744.

20. An insurance corporation requiring transfer of its stock to be made by its officers upon its books, and permitting a trustee or guardian to make such transfer in a fiduciary capacity, knowing the trust and that the transfer is made for other purposes than the trust, will be liable to make it good in equity. Trustees subsequently appointed by an equity court to supersede those removed for their misconduct, have a right to sue in equity to recover funds misappropriated by their predecessors. Such right is not limited to the *cestui que trust*. The case is different from that of an administrator *de bonis non*.

1 G. & I., 270; Hagthorp vs. Hook, 3 Rawle, 361; Potts vs. Smith, 5 Rand., 51; Wernick vs. M'Murdo, 23 N. J., Eq., 364; Cassick vs. Cassick, 16 Wallace, 535; Beall vs. New Mexico..

Where the suit in no wise affects the relation of the trustees with the *cestui que trust*, the latter need not be made a party.

Casey et al. vs. Brown, 2 Otto, 171; Ashton vs. Atlantic Bank, 3 Allen, 712.

A transfer of stock by an executor is notice to the company of the will under which he assumes to act, whose provisions it must be assumed to know, and where the circumstances of the transfer were sufficient to indicate that the executor was exceeding his power, the company will be responsible as the custodian of the fund, and liable for the negligence of its officers in permitting the transfer.

Lowry vs. Com. & F. B'k, Camp. Rep., 320; Albert et ux. vs. Sav. B'k, 2 Md., 163; Farm. & Mech. B'k vs. Wayman, et al., 5 Gill, 336; Telegraph Company vs. Daveuport, 7 Otto, 369; Pollock vs. National Bank, 3 Selden, 274.

Stewart & Duffy vs. Firemen's Ins. Co., Md. C. A., 9 Ins. Law Jour., 838.

21. The charter of the Great Western Insurance Company prohibited it from loaning on its own stock. The president had discretionary power from the finance committee to make loans. The

president made a loan to a director, and a member of the finance committee, on the company's stock as collateral.

Held, that the transaction was void, and not made by the company, but by the president without authority. The action on the part of the director was fraudulent. The company has an equitable lien upon the stock for the benefit of the stockholders. The company was justified in selling the stock to satisfy its claims, and the proceeds of such sale could not be claimed by his administrator as part of the director's (since deceased) estate.

Weid, executor, vs. Great Western Ins. Co., New York Court of Common Pleas, 4 Ins. Law Jour., 397.

See Cross Index at end of volume, for other cases bearing on CAPITAL STOCK.

CARGO.

ABSTRACT OF THE LAW.

a. Cargo includes generally all goods and merchandise shipped for sale, but not such articles as are the private property of those on board, or are intended for the use of the vessel, crew or passengers.

Wolcott vs. Eagle Ins. Co., 4 Pick., 429; Seton vs. Del. Ins. Co., 2 Wash. C. O., 173; Hill vs. Patten, 8 East., 373.

b. A policy on cargo does not usually cover goods on deck unless usage or safety sanctions their stowage there.

Taunton Copper Co. vs. Merch. Ins. Co., 22 Pick., 108; Smith vs. Miss. F. & M. Ins. Co., 11 La., 149.

See further on this subject under ABANDONMENT, GENERAL AVERAGE, LOSS, MEASURE OF DAMAGES, PARTICULAR AVERAGE, POLICY, RISK.

DIGEST OF RECENT CASES.

1. Merchandise though used as dunnage must be regarded as cargo when freight is paid for it. A warranty in the policy not to load more than her registered tonnage, will be broken by an excess of such merchandise, though it would not have been in the case of mere dunnage.

Great Western Ins. Co. vs. Thwing, U. S. S. C., 2 Ins. Law Jour., 200.

2. Cargo stowed with due diligence and properly according to the custom of the country where loaded, might be deemed properly stowed though not deemed proper according to the custom of the country where the vessel belonged. But no such custom can be pleaded against a stowage manifestly wrong and improper.

Knight vs. Globe Mar. Ins. Co., Eng. High Court of Justice.

See Cross Index at end of volume, for other cases bearing on CARGO.

CARRIER.

ABSTRACT OF THE LAW.

a. Common carriers are liable for the safe transport and delivery of goods, and nothing will excuse but the act of God or a public enemy. Their liability by express contract, however, may be limited by excepting losses, the result of accident against which the most prudent skill will not avail. They cannot except such as result from their own negligence.

Steinway vs. R. R. Co., 43 N. Y., 126; *Jackson vs. R. R. Co.*, 31 Iowa, 176; *N. J. R. R. vs. Bank*, 6 How., 385.

See further on this subject under INSURABLE INTEREST, POLICY, RISK, TITLE.

DIGEST OF RECENT CASES.

CARRIER—RESPONSIBILITY OF.

1. In the case of a vessel wrecked against a bridge on the Mississippi, *Held*, that the burden of proof is on the carrier, and nothing short of a clear proof, leaving no room for controversy, should be permitted to discharge him from the duties which the law has annexed to his employment.

Steamboat Mollie Mohler vs. Home Ins. Co., U. S. S. C., 4 *Ins. Law Jour.*, 799.

2. Cars of the W. company, loaded with cotton, placed on a Y belonging to the N. company, but built for the common use of all the connecting roads, for further transport to its destination, were fired, as alleged, by sparks from an engine of the N. com-

pany carelessly run. The cotton was in open cars unprotected from fire. The N. company had not been notified of the delivery. In an action by the insurer, who was subrogated to the rights of the owner; *Held*, that until the cars had been hauled to the transfer platform, and the freight checked off and received by the receiving clerk of the N. company, there was no delivery, and the W. company was liable. *Held*, that the N. company was not chargeable with contributory negligence.

Kentucky M. and F. Ins. Co. vs. W. and A. R. R., Tenn. S. C., 6 Ins. Law Jour., 372.

3. Cotton was shipped by a railroad company, and after its delivery, but before the cotton had started on its destination, a bill of lading was given which exempted the carrier from loss by fire. Insurance was effected by the shipper, and the bill of lading delivered to the insured.

Held, in an action by the insurer against the carrier, that the plaintiff was subject to any defense that would be available against the shipper. *Held*, that in the absence of negligence the bill of lading exempted the carrier from liability. *Held*, that the bill of lading, having been accepted without objection, was the contract, and the shipper could not resort to an alleged prior oral agreement; he was bound to know its contents. To take the case out of this rule it would be necessary to show that the goods had passed beyond the shipper's control before the bill of lading was delivered.

Long vs. N. Y. C. R. R. Co., 50 N. Y., 76; Belger vs. Dinsmore, 51 N. Y., 166; Steers vs. Liverpool, etc., S. S. Co., 57 N. Y., 1; Magher vs. C. & A. R. R. Co., 45 N. Y., 514; Boswick vs. Balt. & O. R. R. Co., 45 N. Y., 712; Hall vs. Ins. Co., 13 Wallace, 367.

Germania F. Ins. Co. vs. Memphis & Charleston R. R. Co., N. Y. C. A., 7 Ins. Law Jour., 547.

4. In the case of a contract with an express company, the shipper must look primarily to the company; and if he seeks to hold its agents responsible, it must be through the contract of the express company with himself.

N. J. Steam Nav. Co. vs. Merch. Bank of Boston, 6 Howard, 344.

Where the contract with the despatch company was for transportation from St. Louis to Liverpool, no particular inland route

being mentioned, and limited the liability to loss on its own road, and the loss occurred after the goods had passed into the control of another road, with which it had an agreement for the transport of goods; *Held*, that the despatch company was not liable, and an insurer subrogated to the rights of the owner could not recover against it, nor against the railroad company which was employed as its agent.

St. Louis Ins. Co. vs. St. Louis, Vandalia & Terre Haute R. R. Co., U. S. C. C., Mo., 7 Ins. Law Jour., 343.

See Cross Index at end of volume, for other cases bearing on CARRIER.

CERTIFICATE.

See PROOF OF LOSS.

See Cross Index at end of volume, for cases bearing on CERTIFICATE.

CHARTER.

ABSTRACT OF THE LAW.

a. The charter is the only authority under which a corporation can legitimately exist or do business; all contracts, therefore, foreign to the purpose of its organization, are void.

1 Chitty on. Cont., 11 Amer. Ed. and Notes; *Head vs. Providence Ins. Co.*, 2 Cranch, 127; *Mut. Ben. Ins. Co. vs. Davis*, 12 N. Y., 569.

b. But a mere excess of their powers under the charter by the officers of a corporation, if not foreign to the general purpose of its organization, nor of such a character that the insured must be presumed to have knowledge thereof, will not necessarily affect the validity of the act.

Ill. &c. Ins. Co. vs. Marseilles &c. Mfg. Co., 6 Ill., 236; *Security F. Ins. Co. vs. Ins. Co.*, 7 Bush., 81.

c. A provision in the charter requiring the contract to be in writing, will not prevent the making of binding contracts for insurance by parol, or otherwise than as prescribed.

Dayton Ins. Co. vs. Kelly, 24 Ohio St., 345; *First Bapt. Church vs. Ins. Co.*, 19 N. Y., 305; *N. E. Ins. Co. vs. Robinson*, 25 Ind., 536; *Myers vs. Ins. Co.*, 27 Penn. St., 268.

d. In the case of mutual companies, the charter and by-laws enter by impli-

cation into contracts with the members, who are presumed to have knowledge of them and cannot allege the contrary.

Hackney vs. Alleghany Mut. Ins. Co., 4 Barr., 185; *Mitchell vs. Lycoming Ins. Co.*, 1 P. F. Smith, 402; *Ins. Co. vs. Mayor of N. Y.*, 8 Barb., 450; *Hope Mut. F. Ins. Co., vs. Beekman*, 47 Mo., 93.

c. But this rule does not apply until membership is complete through the completion of the contract, nor to those who insure upon the stock plan, nor to by-laws passed subsequent to the completion of the contract without the consent of the member, which impair his rights under the contract.

Columbia Ins. Co. vs. Cooper, 14 Wr., 331; *Illinois F. Ins. Co., vs. Stanton*, 57 Ill., 354; *Hamilton Mut. Ins. Co., vs. Hobart*, 2 Gray (Mass.), 543; *Cumberland Valley Mut. Prot. Co., vs. Schell*, 5 Casey, 31.

See further on this subject under CONTRACT, DIRECTOR, MUTUAL COMPANY, PAROL CONTRACT, POLICY, PREMIUM, PREMIUM NOTE.

DIGEST OF RECENT CASES.

1. Transfer of charter by directors, without authority of stockholders, is invalid, and transferees take nothing; but subsequent participation in the business, or silent acquiescence by the stockholders, estops them from denying the validity of the transfer, in a suit brought by assignee in bankruptcy; and where additional stock is issued by the transferees in compliance with a law authorizing such increase, the stockholders are estopped from denying the validity of the proceedings to increase the stock, or the validity of the stock issued.

Upton vs. Jackson, U. S. C. C. Mich., 4 *Ins. Law Jour.*, 189.

2. A provision in the charter of a mutual insurance company, that if a certificate of a right to receive a share of profits should not be presented within five years after notice of readiness to redeem should be given, it should be canceled on the books of the company, and the amount carried to the credit of the company, is not a forfeiture against which equity will relieve, but a mere limitation. In such case formal cancellation is not necessary to bar a recovery on the certificate; the bar becomes complete by mere lapse of time.

Lang vs. Delaware Safety Ins. Co., Pa. S. C., 10 *Ins. Law Jour.*, 226.

3. The subscriptions to the stock of an insurance company were not paid in *money*, as directed by acts of Assembly, but in railroad and turnpike bonds, mortgages, etc. *Held*, that the charter of the company must be revoked.

A charter for a *mutual* insurance company was first obtained, and afterwards an amendment was procured, incorporating the company as a *stock* company. *Held*, that the amendment made it one company, and the *stock* charter being revoked, the *mutual* charter goes with it.

Commonwealth vs. Manfr's. Ins. Co., Dauphin Co. Pa. C. P., 4 Ins. Law Jour., 470.

See Cross Index at end of volume, for other cases bearing on CHARTER.

COAL OILS. .

See KEEPING AND STORING, PROHIBITED RISKS.

See Cross Index at end of volume, for cases bearing on COAL OILS.

COLLISION.

ABSTRACT OF THE LAW.

a. When collision is due to a peril of the sea, the insurer is liable.

Buller vs. Fisher, 3 East., 67; Nelson vs. Suffolk Ins. Co., 8 Cush., 477.

b. Collision, however, when the proximate cause of loss, is not within perils of the sea.

Waters vs. Merchants' Ins. Co., 11 Pet., 213.

c. When both parties are in fault, the loss from collision is generally shared between the two.

Reeves vs. Ship Constitution, Gilpin, 579.

d. In case of mutual fault or in the absence of fault the insurer is liable only for the damage to his own risk; but if the fault rests on the other side, the insurers, though liable, are subrogated to the rights of the insured.

Smith vs. Scott, 4 Taunt., 126.

e. Authorities are not agreed, however, whether insurers are liable for compensation due to another vessel in case of collision.

Walker vs. Boston Ins. Co., 14 Gray, 2; General Ins. Co. vs. Sherwood, 14 How., 361; Mathews vs. Howard Ins. Co., 1 Ker., 9.

See further on this subject under BARRATRY, PERILS OF THE SEA.

DIGEST OF RECENT CASES.

COLLISION—LIABILITY FOR.

1. An insurance of a steamboat "against loss by fire only," must be held to embrace losses by fire generally without regard to the causes which produced the fire. The policy excepted from losses from certain specified causes, but collision was not named among them. *Held*, that a fire caused by collision was a loss by fire within the meaning of the policy.

United L. F. & M. Ins. Co. vs. Foote, 22 Ohio St., 350.

Held, that a failure of the pilot to comply with the rules of navigation, if the violation is not willful or fraudulent, or grossly negligent, is not barratry in the event of damage resulting.

Germania Ins. Co. vs. Sherlock, O. S. C., 25 O., 33; 4 *Ins. Law Jour.*, 531.

2. Owners of vessels are not liable under existing laws, for any loss, damage or injury by collision, if occasioned without their privity or knowledge, beyond the amount of their interest in such ship and her freight then pending at the time the collision occurs. The damages which the owner of the injured vessel is entitled to recover are estimated in the same manner as in suits for injuries to other personal property, and the claim for compensation may in certain cases extend to the loss of freight, necessary expenses in making repairs, and unavoidable detention. Where repairs are practicable, the damages must be sufficient to restore the injured vessel to its former condition.

The Clyde, Swabey, 24; *The Gazelle*, 2 W. Rob., 280; *The Baltimore*, 8 Wall., 385; *Williams & Bruce Prac.*, 77; 1 *Parsons on Ship.*, 538; *The Pactolus*, Swabey, 174.

The reception of the amount of the loss from the insurers is no bar to an action subsequently commenced against the wrong-doer to recover compensation for the injury occasioned by the collision.

Mason vs. Sainsbury, 3 Doug., 61; *Maude & P. on Shipping*, 3d ed., 465; *Flanders on Ins.*, 591; *Yates vs. White et al.*, 4 Bing. N. C., 482; 1 *Park. on Ins.* (8th ed.), 330; *Ins. Co. vs. Sainsbury*, 3 Doug., 245; 2 *Marsh. on Ins.* (2d ed.), 794; 2 *Park. on Ins.* (8th ed.), 969; 2 *Phillips on Ins.* (5th ed.), sec. 2001.

Compensation by the wrong-doer after payment by the insurers, is not double compensation; the wrong-doers are first liable,

and the insurers, if they pay first, are entitled to be subrogated to the rights of the insured against the insurers.

May on Ins., 555; Randall vs. Cockran, 1 Ves., Sen., 90; Godsall vs. Bol-
dero, 9 East., 81; Irving vs. Richardson, 1 B. & Adol., 196; Case vs. David-
son, 5 Maule & Selw., 81; Clark vs. Blything, 2 Barn. & Cresw., 256.

The owners of a vessel injured by collision may recover com-
pensation either against the owners, or the master, or the ship, at
their election.

The Volant, 1 W. Rob., 337; Maude and P. on Ship. (3d ed.), 466.

But the cargo is not liable.

The Victor, 1 Lush. Adm. R., 76.

The law varies according to the circumstances that gave rise to
the accident. Except when both parties are to blame, the offending
party can recover nothing, whether he pursues his remedy in the
admiralty or at common law. Where both are to blame, neither
can recover anything at common law, but the admiralty requires
each to suffer a moiety of the loss. Parties without fault, such
as shippers and consignees, bear no part of the loss in collision
suits, and are entitled to full compensation for the damages which
they suffer from the wrong-doers, and may pursue their remedy
in personam, either at common law or in admiralty, against the
wrong-doers, or any one or more of them. Such a party is not re-
quired in any event to bear any portion of the loss suffered by
others, the rule being that where the collision occurs exclusively
from natural causes, without any fault of either of the colliding
vessels, the loss shall rest where it happens to fall. Inevitable
accident is a good defense in such a controversy where both ves-
sels are free from blame, but it is utterly unavailing if either or
both were in fault. It is the rule of the court that where both ves-
sels are in fault, the damage shall be equally apportioned between
the offending vessels, as having been occasioned by the fault of
both.

Citing and discussing the following cases: The Woodrop, 2 Dodson, 85;
The Shannon, 1 W. Rob., 470; The Itinerant, 2 W. Rob., 243; The Locklibo,
3 W. Rob., 318; The Morning Light, 2 Wall., 560; Vaux vs. Sheffer, 8 Moore
P. C. C., 87; Maude & P. on Ship. (3d ed.), 470; LeNeve vs. Shipping Co., 1
Shaw's Cas., 378; Hay vs. LeNeve, 2 Shaw's H. of L. Cas., 400; The Washing-
ton, 5 Jurist, 1067; DeVaux vs. Salvador, 4 Adol. & Ellis, 431; MacLachlan
on Ship. (2d ed.), 286; Parsons on Ship., 527; Williams & Bruce Prac., 71.
The Lima, 4 Jurist, N. S., 147; The Aurora, Lush. Adm. R., 329; The Milan,

Lush. Adm. R., 401; Murray vs. Lovejoy, 2 Cliff., 196; same case, 3 Wall., 19; Smith vs. Hines, 2 Sum., 348; Webster vs. Railroad, 38 N. Y., 261; Guile vs. Swan, 19 John., 382; Steamboat Co. vs. Chase, 16 Wall., 533; The Belfast, 7 ib., 644; Simpson vs. Hand, 6 Whart., 321; Colegrove vs. Railroad, 2 N. Y., 493; Catlin vs. Hills, 8 C. B., 125; Vanderplank vs. Miller, 1 Moo. & Mal., 169; 1 Stat. at Large, 77; The Alabama vs. Gamecock, 2 Otto, —, the Atlas, 4 Ben. R., 28, and same case, 10 Blatch., 460; The Gregory, 9 Wall., 516; The New Philadelphia, 1 Black, 76; Boyer vs. Sturgis, 24 How., 122; The Catharine, 17 How., 177; The Sunnyside, 1 Otto, 216; The Continental, 14 Wall., 355; The Morning Light, 2 ib., 560; The Pennsylvania, 24 How., 313.

Steamboat Atlas, etc., vs. Phoenix Ins. Co., U. S. S. C., 6 Ins. Law Jour., 897.

COMPROMISE.

See ADJUSTMENT.

See Cross Index at end of volume, for cases bearing on COMPROMISE.

CONCEALMENT.

ABSTRACT OF THE LAW.

a. The intentional concealment of any fact material to the risk which should have been disclosed to the insurers, will forfeit the contract.

Girard Ins. Co. vs. Stevenson, 87 Penn. St., 298; Houghton vs. Manufacturers' Ins. Co., 8 Met. (Mass.), 114; Columbian Ins. Co. vs. Lawrence, 10 Pet. (U. S.), 507; Daniels vs. Hudson River Ins. Co., 12 Cush. (Mass.), 416; Vale vs. Phoenix Ins. Co., 1 Wash. C. C. (U. S.), 33; Protection Ins. Co. vs. Harmer, 3 Ohio St., 452.

b. Actual or presumptive knowledge by the insurer, however, excuses disclosure whether the facts withheld be material or not, and such knowledge on the part of the insurer may be presumed concerning facts about which no information is sought, and whose disclosure would not naturally suggest itself to the insured.

Clark vs. Manufacturers' Ins. Co., 8 How. (U. S.), 235; Hartford Protection Ins. Co. vs. Harmer, *supra*; Burritt vs. Saratoga Ins. Co., 5 Hill (N. Y.), 182; Liberty Hall Ass. vs. Ins. Co., 7 Gray (Mass.), 261; Daniels vs. Hudson River Ins. Co., *supra*; Wolf vs. New York Firemen's Ins. Co., 20 Johns. (N. Y.), 214; Norris vs. Ins. Co., 3 Yeates (Penn.), 84; Lexington Ins. Co. vs. Paver, 16 Ohio, 324.

c. The test of materiality is whether the facts, if known, would have induced the insurers to decline the risk or charge a higher rate.

Columbian Ins. Co. vs. Lawrence, 10 Pet. (U. S.), 516; Boggs vs. American Ins. Co., 30 Mo., 63.

d. The question of materiality, however, is ultimately one of fact for the jury. *Franklin Ins. Co. vs. Coates*, 14 Md., 285; *Sussex Co. Ins. Co. vs. Woodruff*, 46 N. J., 541; *Curry vs. Ins. Co.*, 10 Pick, 535; *Gates vs. Hudson Co. Mut. Ins. Co.*, 2 N. Y., 43.

e. Mere rumors or threats tending to increase the risk, however, need not be disclosed unless they manifestly involve a substantial danger.

Keith vs. Globe Ins. Co., 52 Ill., 518; *Fish vs. Collinette*, 44 N. Y., 538; *McBride vs. Republic Ins. Co.*, 30 Wis., 562.

f. If the insured makes what he has reason to regard as a fair statement of the facts called for by the insured, or which he ought to know in respect to the character of the risk, the nature of the interest, the location, surroundings, etc., he is not usually responsible for disclosures not specifically called for.

Kernochan vs. Ins. Co., 17 N. Y., 428; *Hill vs. Lafayette Ins. Co.*, 2 Mich., 465; *Greene vs. Merchants' Ins. Co.*, 10 Pick., 402; *Kimball vs. Aetna Ins. Co.*, 9 Allen (Mass.), 540; *Fletcher vs. Ins. Co.*, 18 Pick. (Mass.), 419; *Benedict vs. Ins. Co.*, 31 N. Y., 389; *Richmondville Seminary vs. Hamilton Ins. Co.*, 14 Gray (Mass.), 439; *Hartford Protection Ins. Co. vs. Harmer*, 2 Ohio St., 452.

g. Knowledge of the agent either actual or constructive is usually a waiver of concealment.

Continental Ins. Co. vs. Kasey, 25 Gratt. (Va.), 268; *Norris vs. Ins. Co. of N. A.*, 3 Yeates (Penn.), 84; *Russ vs. Ins. Co.*, 52 Me., 187; *Smith vs. Ins. Co.*, 25 Penn. St., 820; *Cumberland Valley, etc., Ins. Co. vs. Schell*, 30 Penn. St., 81; *James River Ins. Co. vs. Merritt*, 47 Ala., 387.

See further on this subject under REPRESENTATION, WARRANTY.

See Cross Index at end of volume, for cases bearing on CONCEALMENT.

CONSIGNEE.

ABSTRACT OF THE LAW.

a. The consignee has an insurable interest to the extent of the full value of the goods where he is liable for their loss; but where he is not liable for their loss, or has made no agreement to insure them, his interest is limited to his advances. He may, however, insure to the extent of the value, as trustee of the consignor, even in the absence of any instructions.

Ellsworth vs. Alliance Ins. Co., L. R., 8 Q. B., 596; *Putnam vs. Mercantile Ins. Co.*, 5 Met. (Mass.), 386; *Aetna Ins. Co. vs. Jackson*, 16 B. Mon., 242.

The consignee not yet in receipt of the goods has usually no insurable interest beyond his advances.

De Forest vs. Fulton Ins. Co., 1 Hall (N. Y.), 84.

See further on this subject under INSURABLE INTEREST, POLICY, TITLE.

DIGEST OF RECENT CASES.

CONSIGNEE—INSURABLE INTEREST OF.

1. A consignee of goods delivered to be sold on commission, has an insurable interest in such goods. As a general rule, an insurance on the "stock of goods" of a merchant, means such goods as he may from time to time buy in the ordinary course of business. But such a policy issued to forwarding and commission merchants may cover goods delivered for sale on commission if such were the intention of the parties. Goods which are charged to a firm, when delivered with the understanding that they are to account for the goods at the prices charged, if sold, and if not sold to remain subject to order, are held by the firm, not as owners, but as consignees. *Quere*, whether extent of interest need be set forth in application or policy.

2 Pet. 25, that it is, and *contra*, 1 Sandf. 551; 12 Wend., 507; 13 Mass., 61; 1 Caines, 276; 1 Johns., 276; Phillips on Ins., 64, 94, 41; 2 Am. L. C., 930.

Planters' Mut. Ins. Co. vs. Engle, Md. C. A., 9 *Ins. Law Jour.*, 71.

2. Factors are not bound to insure the goods of their principals unless so instructed, or required by the usages of trade or previous custom, but in such cases they are bound to insure, and failing so to do, are liable for the loss, less premiums which should have been paid.

Schoenfeld vs. Fleisher, Ill. S. C.

3. A consignee is liable for loss upon failure to insure as instructed by owner. If he has insured in his own name and fails to collect the money, he is liable as insurer. A third person, not a party, no matter what his interest, in order to sue must show that the policy was assigned to him with the consent of the insurer, and that the property had been insured as his property.

Gordon & Gomilla vs. Wright & Clark, La. S. C., 29 *La.*, 812.

4. When one, not under contract to insure another's goods, does insure them together with his own, and, because the insurance companies become insolvent, does not receive enough insur-

ance money to cover his own loss, he is not obliged to pay any portion thereof to the other, even though he had included his goods in a statement of loss rendered the insurance companies.

Reitenbach vs. Johnson, Mass. S. J. C., 10 Ins. Law Jour., 15.

5. Insurance effected by a consignee "on merchandise his own or held by him in trust, or on commission," is not limited merely to his proprietary interest, but enures to the benefit of the consignor.

Johnson vs. Campbell, Mass. S. J. C., 120 Mass., 449.

See Cross Index at end of volume, for other cases bearing on CONSIGNEE.

CONSTRUCTION.

ABSTRACT OF THE LAW.

a. The policy must be liberally construed to carry out the real intent of the parties.

Bowman vs. Pacific Ins. Co., 27 Mo., 15; Montgomery vs. Firemen's Ins. Co., 16 B. Mon. (Ky.), 427.

b. The intention of the parties must be gathered from the contract and not from external evidence.

Home Ins. Co. vs. Updegraff, 40 Penn. St., 311.

c. All policy stipulations are to be given effect if possible, but in case of conflict, written stipulations must prevail over those which are printed.

Letiner vs. Granite Ins. Co., 5 Duer (N. Y.), 394; Bargett vs. Orient Ins. Co., 3 Bos. (N.Y.), 385.

d. Words are to be construed most strongly against the insurer and in the sense in which he has reason to suppose they were understood by the other party.

Montgomery vs. Firemen's Ins. Co. supra; Marco vs. L. L. & G. Ins. Co., 35 N. Y., 664.

e. Words used in a technical sense are to be so construed, but in case of judicial construction such construction must control.

Mobile Ins. Co. vs. McMillen, 2 Ala., 77; Goss vs. Citizens' Ins. Co., 18 La. An., 97.

For further reference to this subject see under APPLICATION, CONTRACT, POLICY.

DIGEST OF RECENT CASES.

1. The application of the maxim *noscitur a sociis* is not conclusive, but it has its force and significance where every other word used in the proviso designates the means by which a fire may happen for which the company will not be liable, and expresses clearly what is unlawful and employed to disregard or subvert the laws of the government.

Boon vs. Aetna Ins. Co., U. S. C. C. Conn., 4 Ins. Law Jour., 27.

2. The words "joint stock fire and marine insurance companies," as used in statute 1872, ch. 375, sec. 7, and statute 1874, ch. 222, of Massachusetts, apply only to corporations organized under the general law, and not to those established under special charters. They do not prohibit a company organized under special charter from declaring a cash dividend in excess of ten per cent.

Insurance Commissioner vs. Mercantile Mar. Ins. Co., Mass. S. J. C., 5 Ins. Law Jour., 619.

See Cross Index at end of volume, for other cases bearing on CONSTRUCTION.

CONTRACT.

ABSTRACT OF THE LAW.

a. The contract in fire insurance is one of indemnity, and the liability of the insured is limited to the actual amount of loss or damage within the policy.

Waters vs. Merchants' Ins. Co., 11 Peters, 218; Patapsco Ins. Co. vs. Coulter, 8 Peters, 223; 1 Phillips on Insurance, sec. 1.

b. A policy or other printed instrument is not essential to constitute a complete and valid contract. When the minds of the parties have fully met upon all the conditions of insurance, and the premium has been paid or the payment waived, the contract is complete if the agreement is *in presenti*.

Commercial Ins. Co. vs. Union Ins. Co., 19 How., 318; First Bap. Church vs. Brooklyn Ins. Co., 19 N. Y., 305; Kohn vs. Ins. Co. of N. A., 1 Wash. C. C. (U. S.), 93; Perkins vs. Washington Ins. Co., 4 Cowen (N. Y.), 645.

c. The insurance contract is governed by the same rules and principles of construction which govern other contracts.

Portsmouth Ins. Co. vs. Brinckley, 2 Ins. L. J., 842; Ill. Ins. Co. vs. Marshal, 1 Gillen, 236.

d. The contract being unilateral, in case of ambiguity it must be construed most favorably to the insured, and such construction as gives the largest indemnity must prevail.

Hoffman vs. Aetna Ins. Co., 32 N. Y., 413; Reynolds vs. Commerce Ins. Co., 47 N. Y., 507; Wilson vs. Conway Ins. Co., 4 R. L., 141; Franklin Ins. Co. vs. Updegraff, 43 Penn. St., 350.

e. The construction must be reasonable, and determined if possible from the whole contract, and from the apparent intention of the parties.

Aurora Ins. Co. vs. Eddy, 49 Ill., 106; Astor vs. Union Ins. Co., 7 Cowen (N. Y.), 202; Goss vs. Citizens' Ins. Co., 18 La. An., 97.

f. In order to complete a contract, the risk insured against, the amount of indemnity, and the duration, must be definitely fixed, and the premium and its terms of payment, definitely agreed upon.

First Bap. Church vs. Brooklyn Ins. Co., 28 N. Y., 153; Strohn vs. Hartford Ins. Co., 37 Wis., 635.

g. Both parties must be equally bound.

Wood vs. Poughkeepsie Ins. Co., 32 N. Y., 619.

h. Valid contracts for insurance may be made by parol, though the charter requires contracts of insurance to be in writing.

Security Ins. Co. vs. Kentucky Ins. Co., 7 Bush. (Ky.), 81.

i. The contract is complete if the risk has been accepted and sufficient notice of the fact forwarded to the insured, though it may not have reached the latter.

Hallock vs. Ins. Co., 26 N. J., 268; Tayloe vs. Merchants' Ins. Co., 9 How. (U. S.), 390.

j. The contract may be complete though the company had not been agreed to by the insured, if the selection has been left to an agent and formally made by him.

Ellis vs. Albany City Ins. Co., 50 N. Y., 402.

k. The contract is complete when the policy has been forwarded to the agent for delivery without discretion, though not in fact delivered.

Hallock vs. Ins. Co., 26 N. J., 268.

l. If the policy varies from the real contract it is not binding on the insured until delivered.

Pattison vs. Mills, 2 Bl. (N. R.), 519.

See further on this subject under AGENT, APPLICATION, CANCELLATION, PAROL CONTRACT, POLICY, PREMIUM, PREMIUM NOTE, REFORMATION.

DIGEST OF RECENT CASES.

CONTRACT—WHEN COMPLETE OR BINDING.

1. It is not necessary that a written policy should be issued to render the company liable.

Tayloe vs. Merchants' F. Ins. Co., 9 Howard, 390.

A contract to insure, entered into for a good consideration, which is received, will be enforced whether in writing or parol. The insurance was on goods in bond, in warehouse, Division A. According to custom no formal policy was issued. The usual entries were made in an "open policy book," held by insured, and in the agent's book. The entry in the latter was "Warehouse B." *Held*, that it was a question of fact for the jury, under conflicting evidence offered, whether B. stood for a warehouse division or goods in bond.

Hartford F. Ins. Co. vs. Farrish, Ill. S. C., 5 Ins. Law Jour., 46.

2. The acceptance of an application for insurance is the completion of the contract to insure, when the applicant is notified thereof.

If the proposal for insurance stipulates that the company's agent who forwards it shall act for both parties, delivery of the policy to him consummates the insurance.

Alabama Ins. Co. vs. Herron, Miss. S. C., 56 Miss., 643.

3. Plaintiff applied to the local agent for insurance on a mill, which he was not allowed to effect without consulting the general agent. An application was filed and forwarded at 5½ per cent. The general agent declined to accept at less than 6½. After considerable preliminary correspondence, plaintiff wrote to the local agent, "6½ per cent is pretty heavy, but I guess we will have to stand it, as I do not know where we can do better at present." The local thereupon wrote to the general agent: "Please send me a ticket for \$4,000 insurance on application." A few minutes after the receipt of this letter, the general agent received a telegram from the local agent saying: "Do not return ticket for mill insurance; it is burned." The ticket was accord-

ingly not sent. No premium had been paid or was required until the delivery of the policy, but the policies were usually dated from the time of application. *Held*, that the completion and delivery of the formal documents are not necessary to secure the parties. *Held*, that plaintiff's letter was an acceptance which completed a preliminary contract for insurance.

Ins. Co. vs. Colt, 20 Wall., 567.

The application was made out in the regular form, fully describing the property, naming the amount of insurance and specifying the premium rate; *Held*, that the contract was sufficiently precise and complete in its terms. It was not necessary that the time should be specifically stated—the usual time of one year was implied; nor that the kind of policy should be specified—the usual form of policy will be presumed. *Held*, that the plaintiff should be decreed a policy in the usual form for one year from the date of application, and to be paid the amount for which the company was liable, less the premium which had been tendered and refused.

Eames et al. vs. Home Ins. Co., U. S. S. C., 6 *Ins. Law Jour.*, 689.

4. A valid contract of insurance can be made by parol unless prohibited by statute or other positive regulation.

Sanborn vs. Firemen's Ins. Co., 16 Gray, 448; *Trustees of Bapt. Ch. vs. Brooklyn Fire Ins. Co.*, 19 N. Y., 305; *May on Ins.*, secs. 14-23; *Kelly vs. Commonwealth Ins. Co.*, 10 Bosw., 82. Cases of *Cockerill vs. Ins. Co.*, 16 Ohio, 148; *Duer on Ins.*, 60; *Millar on Ins.*, 30, distinguished.

The company was organized under a general law which required a filing of the charter, in which should be set forth the manner in which the corporate powers were to be exercised, etc. The charter so filed declared its purpose and business to be, to make insurance by instrument under seal or otherwise, etc.; also that the president should be authorized to make contracts of insurance "in and by policy of insurance in writing, to be signed by the president or other officer, and the secretary." *Held*, that these provisions are the language of the company, and simply indicate the ordinary mode of transacting the business of the com-

pany ; they do not prescribe the essential form in which the contracts shall be made :

Sanborn vs. Firemen's Ins. Co., and Trustees, etc., supra.

Held, that the company cannot shelter itself behind its charter to secure exemption from parol contracts, made in good faith with insured parties. *Held*, that chap. 196, sec. 1, of the Massachusetts acts of 1864, does not prohibit parol contracts, but only the practice of referring to a set of conditions not set forth in the policy.

Relief F. Ins. Co. vs. Shaw, U. S. S. C., 6 Ins. Law Jour., 713.

5. Suit was brought by the company to foreclose a mortgage given as security for a note given by defendants for a loan. The company's charter permitted loans to be made only on bond and mortgage, for a term not exceeding one year. *Held*, that where a loan by a corporation can be regularly authorized only by a vote of the directors at an official meeting, a loan made without such a vote may be ratified by the corporation ; an action by the corporation upon the securities given for the loan, is a ratification ; and an averment in such action that the loan was made by plaintiff "through its proper officers," is sufficient. *Held*, that where securities given for a loan made by a corporation, run to persons named as its directors, and to their successors in office, the corporation may sue thereon as owner and holder, without reformation of the instruments ; and without formal assignment to it.

Supervisors vs. Hall, 42 Wis., 59.

Held, that while contracts of corporations which they have no authority to make may be void, contracts which are within the general scope of their powers, but which are in excess of those powers in some particulars, are valid, unless, by reason of such excess, they are against public policy.

Rock River Bank vs. Sherwood, 10 Wis., 230 ; Littlewort vs. Davis, 50 Miss., 403. Cases of M. W. & M. Plank Road Co. vs. W. & P. Plank Road Co., 7 Wis., 59, and N. W. Union Packet Co. vs. Shaw, 37 id., 655, distinguished.

Held, that while the plaintiff exceeded its power in loaning money for two years instead of one, and in taking a note and mortgage therefor, instead of bond and mortgage, the contract

not being immoral, nor against public policy, and no penalty being attached to it, the plaintiff may maintain an action upon the securities.

Germantown Farmers' Mut. Ins. Co. vs. Dheim, etc., Wis. S. C., 8 Ins. Law Jour., 9.

6. The charter of a mutual company provides that it might organize and proceed to business when fifty applications have been procured, and that any person might become a member by subscribing to an application and paying a certain sum stated, but that there should be no liability until fifty applicants had been obtained. After the required number had been procured, the company was organized and a resolution passed that policies should be issued. On the next day, and before any policies were issued, the loss occurred. A few days later the directors rejected the application of the loss claimant, retaining the premium note which he had given, however, until some days later. *Held*, that the company became liable for losses happening after fifty subscribers had been procured; as the insured could not avoid liability on his note, neither could the company escape liability by subsequently rejecting the application and long after returning the note. *Held*, that the secretary having the power of a general agent, might waive the cash payment required by the charter. *Held*, that a by-law requiring the formal approval of directors to applications, and not adopted until fifty applications had been received, of which this was one, did not affect the case. *Held*, that the claimant was entitled to a policy in completed form on the day of organization.

May on Ins., 41, 42; Ennis vs. Ins. Co., 94 U. S., 621; Ins. Co. vs. Webster, 6 Wall., 129; Fried vs. Royal Ins. Co., 50 N. Y., 243; Palm vs. Ins. Co., 20 Ohio, 529.

Van Slyke vs. Trempealeau Co. Farmers' Mut. Ins. Co., Wis. S. C., 48 Wis. 683; 9 Ins. Law Jour., 633.

7. Application was made by letter for shares of stock, and accepted, and a letter so stating was posted, which never reached the applicant. *Held*, that the contract was complete, and the applicant bound from the time of posting the letter of acceptance.

Household F. Ins. Co. vs. Grant, Eng. C. A., 78 L. J. R. N. S., 577.

WHEN NOT COMPLETE OR BINDING.

8. An agreement between a broker, who was agent of the owner, and the clerk or surveyor of the company, to insure, no premium having been paid, was simply a preliminary and not a valid contract.

Durning vs. Phoenix Ins. Co., Ill. S. C., 3 Ins. Law Jour., 677.

9. Where no question of estoppel is raised, a mere verbal contract of insurance is not binding where the charter requires the contract to be in writing, sealed and attested by the officers of the corporation.

Haslett vs. Alleghany Ins. Co., Pa. S. C., 4 Ins. Law Jour., 372.

10. Plaintiff applied for insurance through an agent of the defendant, who gave an *ad interim* receipt acknowledging the receipt of the application and the payment of premium, and setting forth the terms of the contract as stated in the application, which was made a part thereof; also, further providing that "a policy of insurance will be immediately prepared and forwarded by said company in accordance with the terms of the application, should the same be approved. If application be not approved, applicant is to be notified to that effect without delay, when the insurance shall cease and the premium shall be returned. But it is expressly understood and agreed that the risk is accepted and made binding upon the company for the term of thirty days from this date, * * unless applicant is sooner notified of its rejection. If the applicant receives no notice that the risk is rejected, the insurance will cease at the end of said thirty days unless a regular policy has been issued, and the applicant will be entitled to receive from the company a return of premium pro rata for the unexpired time." The premium was not paid, but retained by the insured at the request of the agent, to be called for. Nothing was heard from the application until about fifty days later, when, the property having burned, it was returned to the company with a notice of disapproval. In a suit to compel the company to issue a policy and to recover for the loss: *Held*, that the contract ex-

pired by its own limitation at the end of thirty days, and absence of notice was knowledge of the fact to the insured. *Held*, that a company may be bound though no policy was issued, but there must be a valid contract subsisting between the parties.

New England Fire and Marine Ins. Co. vs. Robinson, 25 Ind., 536; American Horse Ins. Co. vs. Patterson, 28 Ind., 17.

Held, that a mere acceptance of the proposition by the company would not create a valid contract without a notification to the insured.

1 Parsons on Cont., 483; Kennedy vs. Lee, 3 Mer., 440, 453; Hebb's case, Law Rep., 4 Eq., 9. Cases distinguished of Dunlap vs. Higgins, 1 H. L. C., 381; Tayloe vs. Merchants' Fire Ins. Co., 9 How., 390, 402; Trevor vs. Wood, 36 N. Y., 307.

Held, that the insured could not allege an acceptance and subsequent delay and fraudulent withdrawal after the loss, where no notice of such acceptance had been given by the company.

Barr et al. vs. Ins. Co. of North America, Ind. S. C., 61 Ind., 488; 8 Ins. Law Jour., 109.

11. Where a policy of insurance is sent to the assured by a messenger, and he refuses to accept it and pay the premium according to its terms and his agreement, but holds it to look into the standing of the company, while it is under advisement, without delivery, acceptance and payment of the premium, the property is at the risk of the assured, and he cannot recover in case of loss by fire.

If a tenant who engages to procure insurance of property in the name of his landlord, at his own expense, obtains possession of a policy without right, and passes it to the assured fraudulently, though the owner may have no knowledge of the fraud, he cannot recover for a loss under the policy. The tenant is the agent of the landlord, who is affected by his acts.

The company, in such case, is not concluded by the acknowledgment of the receipt of the premium on the face of the policy.

It is too late to accept the policy and tender the premium after the property is destroyed, where the policy requires payment, and there has been no waiver.

Millville Mutual Ins. Co. vs. Collerd, N. J. C. E., 38 N. J., 480.

12. Plaintiff made a written application for insurance to defendant's agent, giving his note for the amount of premium, the agent giving in return a written receipt, which provided that the note should be returned if the policy was not issued. The agent was a special one to receive applications. Through the neglect of the agent, the application and note were not forwarded to the company, and twenty-five days after the papers were executed, a loss occurred. *Held*, that no contract of insurance was entered into that bound the company, but that the company would be liable in a proper action, for the damages sustained by the plaintiff caused by the neglect of their agent to forward the application. Declarations of an agent, made subsequent to the time when the contract is said to have been completed, are not binding on the principal.

Walker vs. Farmers' Ins. Co., Iowa S. C., 8 Ins. Law Jour., 847.

13. Plaintiff employed a broker to obtain insurance on a vessel, who obtained from an agent of defendant company the following paper :

"No. 1002. \$1.200.

DELAWARE STATE FIRE AND MARINE INSURANCE COMPANY.

Wilmington, Delaware.

This certifies that we have this day entered in the name of Loud, Claridge & Co., for whom it may concern, on our open policy, No. 1002, with the Delaware State Fire and Marine Insurance Company, a risk of twelve hundred dollars on bark Palestina, at and from June 20th, 1878, to June 20th, 1879, loss, if any, payable in current funds to Messrs. Loud, Claridge & Co., or order, according to the terms and conditions of the policy.

JAMES S. WATKINS.

Valued \$10,000.

BALTIMORE, June 20, 1878.

\$1,200 at 12 per cent, \$144."

Held, that this slip or memorandum did not constitute a contract of insurance enforceable in an action at law.

Citing 1 Phil. on Ins., 10 (Sec. 13); McKenzie vs. Coulson L. R. (Eq. Cas.) Vol. 8, 863; Xenos vs. Wickham, 108 Eng. C. L. R., 435, 859; Parry vs. Gt.

Ship Co., 4 Best & S., 556. Distinguishing Relief Ins. Co. vs. Shaw, 94 U. S. (4 Otto), 574.

Delaware State F. & M. Ins. Co. vs. Shaw, Md. C. A., 9 Ins. Law Jour., 703.

GENERALLY.

14. Neglect to read a contract before signing will not relieve from obligation.

Jackson vs. Croy, 12 John. R., 427; Leis vs. Stubbs, 6 Watts, 48; Farley vs. Bryant, 32 Me., 474; Coffing vs. Taylor, 16 Ill., 457; Slayton vs. Scott, 13 Ves., 427; Alvanly vs. Kinnaid, 2 Mac. & G. 7; 29 Beavan, 490.

Misunderstanding or misrepresentation of law will not vitiate a contract.

Fish vs. Clelland, 33 Ill., 243; Star vs. Bennett, 5 Hill, 303; Lewis vs. Jones, 4 B. & C., 506; Rashall vs. Ford, Law Rep., 2 Eq., 750; Bank of U. S. vs. Daniel, 12 Pet. R., 32; Hunt vs. Rousman, 1 Pet., 1; 8 Wheat, 174; Mel-
lech vs. Robertson, 25 Vt., 603; Leant vs. Palmer, 3 Conn., 19; Austin's Jour.,
vol. 2, p. 172; Kerr, 397.

Upton vs. Tribilcock, U. S. S. C., 5 Ins. Law Jour., 97.

15. Where the contract is reduced to writing, the writing is regarded as the sole evidence of the contract, and the parties are presumed to have rejected everything it does not contain.

Towner vs. Lucas, 13 Gratt.; Woodward, Baldwin & Co. vs. Foster, 18 Gratt.

This rule applies as well to policies of insurance.

Lee vs. Howard F. Ins. Co., 3 Gray, 583.

The exceptions are where the agent misleads the insured, or seeks to take advantage of a forfeiture of his own creation, or where the agent has misdescribed the property, after a correct description by the insured.

Second Amer. Law Cases, 912 to 915-916; Georgia Home Ins. Co. vs. Ken-
nier, Va. S. C. A. (6 Ins. L. J., 497); Manhattan F. Ins. Co. vs. Weill & Ullman,
Va. S. C. A. (6 Ins. L. J., 521).

Where the application was a warranty and contained a minute description of the property, such as could only be furnished by the insured, followed by a representation of the liens, in the absence of fraud on the part of the agent, parol evidence of the insured is not admissible to vary the written representation as to the liens by a simple denial that such representation was made.

In order to reform a policy on the ground of mistake, the mistake must have been mutual.

Cooper vs. Farmers' Ins. Co., 50 Penn., 297; *Ryan vs. World Life Ins. Co.*, 41 Conn., 168; *Barnett vs. Union Mut. F. Ins. Co.*, 6 Cush., 179; *Jenkins vs. Quincy Mut. F. Ins. Co.*, 7 Gray, 374; *Holmes vs. Charlestown Ins. Co.*, 10 Met., 211.

Southern Mutual Ins. Co. vs. Yates, Va. S. C. A., 6 *Ins. Law Jour.*, 394.

See Cross Index at end of volume, for other cases bearing on CONTRACT.

CONTRIBUTION.

ABSTRACT OF THE LAW.

a. The right of contribution rests upon a concurrence of the policies; the several insurers must be bound with equal certainty and in the same sense on the same loss.

Baltimore F. Ins. Co. vs. Loney, 20 Md., 20.

b. In the absence of any stipulation to the contrary, each insurer is liable for the whole loss and must look to his coinsurers for contribution.

Newby vs. Reed 1 W. Black, 416; *Peoria Mar. & F. Ins. Co. vs. Lewis*, 18 Ill., 553.

c. The proportion in which the policy must contribute is that which its amount of insurance on the property bears to the amount of all the insurance thereon, though other property in addition may be covered by other policies.

Blake vs. Exchange Ins. Co., 12 Gray (Mass.), 263; *Harris vs. Prot. Ins. Co.*, 1 Wright, 548.

d. The courts, however, are not agreed as to what shall be deemed the amount of such insurance when other property is included, or the policies are not strictly concurrent, or contain special limitations upon their liability. The more general rule appears to be that in case of special limitations, the amount must be measured by the actual liability rather than the gross sum named in the contract, and in case of partial non-concurrence general policies must contribute in their whole amount with specific, after first deducting their liability on non-concurrent items.

Haley vs. Dorchester Ins. Co., 12 Gray, 349, and 1 Allen (Mass.), 526; *Blake vs. Exch. Ins. Co.*, *supra*; *Peoria Ins. Co. vs. Wilson*, 5 Minn., 53; *Commonwealth vs. Hide & L. Ins. Co.*, 112 Mass., 136; *Sloat vs. Ins. Co.*, 13 P. F. Smith, 146; *Cromie vs. Ky. & L. Ins. Co.*, 15 B. Mon. (Ky.), 432; *Merrick vs. Germ. F. Ins. Co.*, 54 Penn. St., 277.

e. That method of apportionment will be adopted which will secure the fullest indemnity to the insured, and the ordinary contribution clause becomes inoperative when its application will lessen this indemnity.

Angelrodt vs. Del. Ins. Co., 31 Mo., 593.

For further reference to this subject see under ADJUSTMENT, GENERAL AVERAGE, MEASURE OF DAMAGES.

DIGEST OF RECENT CASES.

CONTRIBUTION—WHEN IT IS OPERATIVE.

1. V. insured his stock in the Home and Merchants' Ins. Co., among others. He afterward took in B. as partner, when it was agreed between them that the policies should be transferred to the firm, which was accordingly done, except in the case of the Home, whose agent they sought but were unable to find. The renewal premium of the Home policy was paid on the day of the fire, just after that event. After the partnership insurance was effected for the firm in the L. L. & G. company, in which it was agreed that in case of other insurance on the property the company should only be liable for its *pro rata* share of loss, and in case of the insured holding any other policy subject to average, this policy should also be so subject. The adjustment, according to the evidence of V., was participated in by the Home without objection, and he accepted from the Hanover company, one of the insurers, the amount due also from the Home, assigning thereupon the Home policy to the Hanover. *Held*, that in an action against the L. L. & G. company the insured cannot assert the invalidity of the Home policy. It was treated as an insurance upon the firm stock, and the L. L. & G. company had a right to regard it as contributory under its policy clause.

Liverpool, London, and Globe Ins. Co. vs. Verdier & Brown, Mich. S. C., 5 Ins. Law Jour., 664.

2. The policy provided that in case of other insurance upon the property, whether prior or subsequent, the insured should be entitled to recover from the company only its *pro rata* share of loss, "without reference to the dates of the different policies, or their invalidity from want of notice of this or other insurance, or from the violation of any of their conditions, or insolvency of any or all the other insurance companies."

Held, that when the insured firm treated another policy, which had been issued to the original members of the firm by the H. company before the partnership, and whose validity might be questioned, as a valid insurance, and had transferred their claims

under it to a third company, the defendant company had a right to regard it as contributory under its policy clause. The question as to how the H. company might regard its policy was immaterial.

Case as first reported in 33 Mich., 138 (5 Ins. L. J., 664).

L. L. & G. Ins. Co. vs. Verdier, Mich. S. C., 6 Ins. Law Jour., 202.

WHEN IT IS NOT OPERATIVE.

3. Insurance was effected by the wharfinger for his own protection on grain in his custody, and for which he was liable in case of fire, subject to average, and stipulating that in case of other insurance on the same property, whether by the same person or another, the company should only be liable for its ratable proportion. Insurance was also effected by the owner under a similar policy. No specific charge was made by the wharfinger against the owner on account of his insurance. *Held*, that the owner's insurance was an indemnity against the possible insolvency of the wharfinger, who was primarily liable, and the former was not liable to contribute with the insurance of the latter on a loss.

North Brit. & Mer. Ins. Co. vs. L. L. & G. Ins. Co., Eng. High Ct. of Justice, Ch. Div., L. R., 5 Ch. D., 569.

PRINCIPLES OF.

4. Contents were insured by a special policy in upper stories, and by general policies in lower and upper stories. Loss in the lower stories exceeded the general policies, and in the upper stories exceeded the special policy. *Held*, that the general policies must be paid in full on the loss below, and not so contribute with the special as to relieve each from a portion of a total loss.

Sloat vs. Royal Ins. Co., 13 P. F. Smith, 146.

Royal Ins. Co. vs. Roedel et al., Pa. S. C., 4 Ins. Law Jour., 840.

5. The policy provided that the insured should not be entitled to recover any greater portion of the loss than the amount insured

under it bore to the total amount insured on the property. The insurance was on live stock, \$1,500. There was insurance on live stock in two other companies for \$1,667 each. But one company provided that no animal should be valued at more than \$500, and the other that the risk on any one should not exceed \$500. The loss was, steers valued at \$336, and one bull valued at \$2,000. *Held*, that the insured was entitled to full indemnity from the three companies; that the insured had insurance only on the value of the bull below \$500, and on the steers, for \$4,833, but not on the value of the bull above that amount. Therefore the defendant was entitled to pro rate with the other companies on the steers and on the bull valued at \$500. *Held*, that this limited the liability of the second company to \$288 on the steers and bull valued at \$500; that the liability of the third company was limited to \$116 on steers and \$500 on bull, leaving the balance of \$1,432 as the total liability of defendant.

Sherman vs. Madison Mut. Ins. Co., Wis. S. C., 39 Wis., 104; 5 Ins. Law Jour., 285.

6. Where the policy covered property belonging to two distinct interests, that of W. and of R., and there was other insurance on the property of W. and the insurance exceeded the loss; *Held*, that such a method of apportionment must be adopted as will secure a pro rata payment from the different companies, and at the same time secure the whole loss to the insured. The rule may be stated thus: As the total insurance of W. is to his total loss, so is the amount of the policy less the amount due to R., to the proportion for which the policy is liable to W. This sum added to the amount due to R. is the total liability of the policy.

Angelrodt vs. Del. Mut. Ins. Co., 50 Mo., 595; Royal Ins. Co. vs. Roedel, 4 Ins. Law Jour., 840; Home Ins. Co. vs. Balt. Warehouse Co., 30 Md., 527.

Robbins & Appleton vs. People's Ins. Co., U. S. C. C. N. J.

See Cross Index at end of volume, for other cases bearing on CONTRIBUTION.

CORPORATION.

DIGEST OF RECENT CASES.

CORPORATION—CITIZENSHIP OF.

1. The members of a corporation created within the sovereignty of Great Britain, and under the laws of that country, must be presumed to be citizens of that kingdom, and as such entitled to have their causes removed to the Federal Circuit Court.

Louisville, Cincinnati, and Charleston Railroad Co. vs. Letson, 2 How., 497; Marshall vs. Baltimore and Ohio Railroad Co., 16 How., 314; Covington Drawbridge Co. vs. Shepherd, 20 How., 232; Ohio and Mississippi Road Co. vs. Wheeler, 1 Black, 286; Railway Co. vs. Whitton, 13 Wall., 290; Bank of Augusta vs. Earle, 13 Pet., 585.

Terry vs. Imp. Fire Ins. Co., U. S. C. C., 4 Ins. Law Jour., 824.

2. A corporation is a citizen of the State creating it, within the clause of the Constitution extending the jurisdiction of the Federal courts to the citizens of the different States. It has the same right to the protection of the law as a natural citizen, and the same right to appeal to all the courts of the country. The rights of an individual are not superior in this respect to that of a corporation.

Whelter vs. Railway Co., 13 Wall., 286; Payne vs. Cork, 7 Wall., 437; More vs. Taylor, 4 Wall., 411, and cases cited; Express Co. vs. Kountze, 8 Wall., 342; Combes vs. Mercer Co., 7 Wall., 118; Wheeler vs. O. & M. R. Co., 1 Black., 286; Paul vs. Virginia, 8 Wall., 168; Bank of Augusta vs. Earle, 13 Peters, 519.

Home Ins. Co. vs. Morse et al., U. S. C. C., 4 Ins. Law Jour., 68.

LEGALITY AND POWERS OF.

3. Ch. 61, Sp. laws 1865, of Minnesota, which purports to amend ch. 7 and 8, laws 1853, being the charter of "the St. Paul Mutual Insurance Company," is not obnoxious to that clause of our constitution which forbids the formation of corporations by

special act. A continued user of the franchises of an incorporated and organized company by persons assuming to act as the directors and officers of such company, persons in the actual possession and exercise of such franchises, and in possession and control of the company's records, and who have carried on its business without any objection, is competent evidence of the continued corporate existence of such company, and the persons who thus claimed to be its directors, and acted as such, were its legal directors.

St. Paul F. & M. Ins. Co. vs. Allis et al., Minn. S. C., 6 Ins. Law Jour., 789.

4. The giving of a note to a corporation is an admission of its existence and an estoppel from denying that it is legally organized.

Society vs. Perry, 6 N. H., 164; Ang. & A. on Corp., 381.

In an action brought by a corporation, the defendant by pleading the general issue admits its capability of sustaining an action. A plea that there is no such corporation must be either in bar or statement.

School District vs. Blaisdell, 6 N. H., 197; Concord vs. McIntire, 6 N. H., 527.

The by-law of a company requiring directors to be chosen at the annual meeting, does not imply that elections held at other times shall be wholly void. The law is merely directory. Irregular elections are only voidable.

Hicks vs. Launaston, Rolle's Ab., 514; The King vs. Poole, B. R. H., 27; Prowse vs. Fort, 2 Bro., P. C.; People vs. Runkle, 9 Johns., 147; Rex vs. Loxdale, 1 Burr., 447; Rex vs. Leicester, 7 B. & C., 12; Dwarris on Statutes, 714.

The acts of such officers are binding while they retain office, and the legality of their election cannot be brought collaterally in question.

Nashua Fire Ins. Co. vs. Moore, N. H. S. C., 55 N. H., 48; 4 Ins. Law Jour., 494.

5. Directors of a fire insurance company have not the power to change the location of the office and place of holding the

election, when these have been fixed by a by-law passed by the individual members, at a meeting held in pursuance of the charter, which gave no power to the directors to make by-laws. Quo warranto and not mandamus is the mode of testing the qualifications of officers of a corporation in Pennsylvania.

United Fire Ass. vs. Benseman, Pa. S. C., 6 Ins. Law Jour., 817.

PROCEEDINGS AGAINST.

6. The creditor of an insolvent corporation, for which a receiver has been appointed under article 2, title 4, of the New York Revised Statutes, must have his right to share in the distribution of its effects determined in the action or proceedings in which the appointment is made. A motion to compel the payment of a judgment by the receiver, obtained in a suit begun after his appointment, in another district, will be denied. The remedy must be sought by application to the court in the district in which the receiver was appointed and in the action in which the appointment was made.

Rinn vs. Astor Fire Ins. Co., N. Y. Com. A., 4 Ins. Law Jour., 603.

See Cross Index at end of volume, for other cases bearing on CORPORATION.

COUNTERSIGNING.

ABSTRACT OF THE LAW.

a. The countersignature of the agent when required by its terms is necessary to complete the written contract and make it binding unless waived.

Lynn vs. Burgoyne, 13 B. Mon. (Ky.), 400; Badger vs. Ins. Co., 103 Mass., 244.

b. But a delivery of the policy or any other act indicating an intention to treat the contract as binding, may be a waiver, though the burden of proof is on the insured.

Badger vs. Ins. Co., supra; Myers vs. Keystone Ins. Co., 27 Penn. St., 268; Norton vs. Ins. Co., 36 Conn., 503.

c. Though the written instrument by its terms or by a chartered provision

be invalid through a failure to countersign, it will not defeat the equitable rights of the insured, if the contract for insurance be complete.

Perry vs. New Castle Ins. Co., 8 U. C. Q. B., 363; *Hibernia Ins. Co. vs. O'Conner*, 29 Mich., 241.

See further on this subject under AGENT, CONTRACT, POLICY.

See Cross Index at end of volume, for cases bearing on COUNTERSIGNING.

DAMAGES.

See LOSS, MEASURE OF DAMAGES.

See Cross Index at end of volume, for cases bearing on DAMAGES.

DECK LOAD.

See CARGO, GENERAL AVERAGE, JETTISON, RISK.

See Cross Index at end of volume, for cases bearing on DECK LOAD.

DEPOSIT.

DIGEST OF RECENT CASES.

DEPOSIT—PROPER DISPOSITION OF.

An Illinois company, in compliance with the statute of Mississippi, deposited with the treasurer of that State \$15,500, which the statute guaranteed to whoever might be determined entitled thereto as provided by the statute. Afterward the company re-insured its Mississippi risks in another Illinois company, and assigned the certificate of deposit to the reinsurer, subject to all legal claims thereon under the statute, of which the treasurer was

duly notified. The reinsured was shortly after adjudged a bankrupt, and the interest of the reinsurer in the fund was confirmed by the court. The treasurer, according to law, published the required notice to all who might have claims against the fund. Meanwhile, suits were instituted by the policy holders of other States in a Mississippi court, and judgments rendered against the treasurer as garnishee. *Held*, that while a negotiable instrument must be unconditional, the assignment to the reinsurer was good in equity. *Held*, that the validity of the assignment, in view of bankruptcy, could only be objected to by the assignee in bankruptcy, and an assignment of his claim to the reinsurer by the assignee in bankruptcy was a confirmation of its title. The Mississippi statute provides that it shall not be lawful for the agent of another State company to do any business without first obtaining a certificate of authority from the auditor, upon furnishing to the latter a statement of the condition of the company as specified, and an authority from the company to accept service, etc., and the agent shall also make the required deposit, which may not be withdrawn until all losses have been settled, and then not until six months' notice has been given to the treasurer; also, that when a judgment or decree remains unsatisfied for thirty days, the creditor may file a transcript with the treasurer, who shall satisfy the claim from the fund unless such judgment or decree be stayed by judicial process; also, a violation of the provisions should be a criminal offense; also, that the unearned premium should be a charge on the deposit; also, that in case of insolvency the treasurer should publish a notice to all policy holders, claimants on the fund; also, that at the end of ninety days from the first publication the treasurer should proceed to pay the claims from the deposit, etc. *Held*, that the statutes must be construed together with regard to their object to protect the citizens of Mississippi. *Held*, that the object being to give foreign companies the same privileges, coupled with the same liabilities, as Mississippi companies, the deposit is intended only for those obtaining policies through authorized agents in the State, and no assignment of the fund nor revocation of agencies can be made to defeat such claims. *Held*, that in case of withdrawal or insolvency, any policy holder may cancel or

surrender his policy and claim the unearned premium, which surrender is to be certified by the agent according to law; but if he refuse, the policy holder may prove his claim. After all such claims have been satisfied, the balance of the fund must be returned to the company depositing, or its assignee. *Held*, that the payment by the treasurer on policies not issued by an authorized agent in the State was improper. *Held*, that the payment of claims for fees due to agents from the insolvent was improper. *Held*, that the party entitled to the fund is entitled to a decree against the parties thus improperly receiving it. *Held*, that the duty of the treasurer in the reception and payment of the fund is ministerial, but that of determining the proper parties in case of insolvency is judicial, and he cannot be held personally liable for a mistake honestly made and free from fraud. *Held*, that attachments obtained in a State court on account of policies issued by agents in another State are not binding against the claim of the reinsurer.

Firemen's Ins. Co. vs. Hemingway, U. S. C. C. Miss., 8 Ins. Law Jour., 521.

See CROSS INDEX at end of volume, for other cases bearing on DEPOSIT.

DESCRIPTION.

ABSTRACT OF THE LAW.

a. When the description is a warranty, any misstatements, whether material or not, will avoid the policy.

Tibbetts vs. Hamilton Ins. Co., 1 Allen, 305; Woods vs. Atlantic Ins. Co., 50 Mo., 112.

b. But where the description is simply a representation, the misstatement must be material.

Stetson vs. Mass. M. F. Ins. Co., 4 Mass., 330.

c. The adequacy of the description is a question for the jury.

Jefferson Ins. Co. vs. Cotheal, 7 Wend., 72; Hall vs. People's Ins. Co., 6 Gray, 183.

d. A misdescription, when it reduces the premium, is material to the risk.

Jefferson Ins. Co. vs. Cotheal, supra; Phoenix F. Ins. Co. vs. Gurnee, 1 Paige (N. Y.), 273.

e. Immaterial omissions do not render the description inaccurate.

Carter vs. Humboldt F. Ins. Co., 17 Iowa, 456.

f. A description as to occupancy is usually simply *in presenti*.

O'Neil vs. Buffalo Ins. Co., 3 N. Y., 122; Yonkers & New York F. Ins. Co. vs. Hoffman Ins. Co., 6 Robt. (N. Y.), 316.

g. A statement regarding the nearest buildings without more, is not generally a warranty that other buildings are not adjacent. Whether an omission to state the latter will avoid the policy, depends upon whether it is material to the risk.

Hardy vs. Union M. F. Ins. Co., 4 Allen, 217; Gates vs. Ins. Co., 2 Comst., 48.

h. But an omission to state other buildings when called for, if a warranty, is a misrepresentation which avoids the contract.

Jennings vs. Chenango Co. Mut. Ins. Co., 2 Denio, 75; Chaffee vs. Ins. Co., 18 N. Y., 376.

See further on this subject under APPLICATION, CONCEALMENT, POLICY, REPRESENTATION, RISK, WARRANTY.

DIGEST OF RECENT CASES.

WHAT IS MATERIAL AND WILL WORK A FORFEITURE.

1. The policy stipulated that the application should be considered a part thereof and a warranty, and that any false representations as to the condition, situation or occupancy should render it void; also that if the interest of the insured was any other than that of sole and unconditioned ownership, it must be so expressed or the policy should be void; also, if the house should remain vacant for ten days without notice or consent the policy should be void. *Held*, that if the house was not occupied as represented, that the contract was violated at its inception and never became binding on the company. *Held*, that a statement in the policy of the existing use of the premises, was a warranty that they were so used *in presenti*.

Flanders on Ins., 289.

Held, that the policy was avoided by any false statement, whether material or not.

Flanders on Ins., 282.

Held, that the provision in the Kentucky statute of Feb. 4th, 1874, that all statements or descriptions in the application shall be deemed representations and not warranties, only applies to those cases where the parties are silent as to the effect of such

statements; it does not hinder the parties from agreeing that they shall be warranties.

Sedgwick on Statutory and Const. Law, 109.

Held, that where the property is held subject to a vendor's lien for a part of the purchase money, this is not a sole and unconditional ownership.

Security Ins. Co. vs. Bunker, etc., 6 Bush., 147; Story's Equity Jurisp., §1217; 4 Kent's Com., sect. 28, p. 152.

Farmers & Drovers' Ins. Co. vs. Curry, Ky. C. A., 6 *Ins. Law Jour.*, 733.

2. An insurance policy upon certain tools, pumps, etc., described them as being "in the one-story frame building situated on the north side of the public square, and west of Fourth Street, Fort Dodge, Iowa." *Held*, a warranty that they would remain in the one-story building in which they were at that time situated, and where there was nothing in the character of the risk that would make a removal within the contemplation of the parties; their removal to another one-story building similarly situated, and some 30 feet distant, was a breach thereof. A clause in an insurance policy that in case of loss the insured shall make oath in their proofs that the property insured was at the time in the building destroyed, is binding. A party cannot recover upon an insurance contract avoided by his own act, though the insurer has not offered to rescind or return unearned premium.

Harris and Cole vs. Royal Canadian Ins. Co., Iowa S. C., 2 *Iowa* 236; 7 *Ins. Law Jour.*, 525.

3. This was an action upon a policy of insurance issued by the Yonkers and New York Fire Insurance Company, of which company defendant is receiver. The policy was upon a stock of goods. The policy stated the distance of the store containing them from other buildings near. The uncontradicted evidence, as the court construed it, showed that the distances to the buildings specified were less than stated in the policy. *Held*, that this was a breach of warranty, and that the trial court erred in refusing to nonsuit plaintiff.

Mamlock vs. Franklin, N. Y. C. A., 65 *N. Y.*, 556.

WHAT IS NOT MATERIAL AND WILL NOT WORK A FORFEITURE.

4. A statement in the policy that the building was used for storing ice was simply descriptive, and not a warranty that ice was there.

Goddard vs. Monitor Ins. Co., distinguished.

A statement made by broker's clerk to the agent of the company that the buildings were full of ice, though false, did not vitiate the policy; the latter had no right to rely on the verbal representations of such a clerk.

Dolliver vs. St. Joseph F. & M. Ins. Co., Mass. S. J. C., 10 Ins. Law Jour., 380.

5. The principle, that equity will reform a written contract where there has been an innocent omission or insertion of a material stipulation contrary to the intention of the parties, is as applicable to a policy of insurance as to any other form of contract. When the agent of an insurance company, to whom an application correctly stated the description of his property, makes a mistake in reducing the application to writing, which is signed by the applicant with a warranty of correctness, and the mistaken description is made a part of the policy, the act of the agent will operate as an estoppel to prevent the company from making the warranty available as a defense. An applicant for a policy of insurance described his property as two-story frame buildings on lots 11, 14, and 15 in block number 309. The evidence disclosed that the applicant owned lots, corresponding in number, on block number 609, on which were situated buildings belonging to applicant, of the description given, while block number 309 was wholly unimproved. *Held*, That there was enough of the description which was true to correct the mistake in the number of the block by construction, if open to correction at all. The fact that the rules of the company prohibited it from taking a risk of over \$3,000 on one block, and that amount had already been taken on other houses on block number 609, but in favor of a party who had forfeited his policy by removal before the mistake in the new policy was made, cannot vary the rule which would permit the mistake to be corrected. The materiality of the number of the block to the mak-

ing of the contract of insurance was a question of fact for the jury. A charge which assumes that the insurance company will be regarded as waiving a misdescription in the application of the property insured, on account of the fact that the president of the company ascertained the mistake and took no steps to cancel the policy, is error, in the absence of facts showing that the president had authority to bind the company in contracts of insurance.

Ins. Co. vs. Lewis, Texas S. C., 48 Texas, 622.

6. The application was for hay in stack and in the field. The policy was on hay in stack within 200 feet of stable. *Held*, that the application having been by apt words made part of the policy, the misdescription was immaterial. The two must be construed together.

Edwards vs. Farmers' Ins. Co., Ill. S. C.

7. A threshing machine was described in the application, first as on Sec. 36, T. 23, R. 28; and again as "stored in barn, on section 36, T. 23, R. 28." In the policy it was described as "threshing machine, Sec. 36, T. 23, R. 38," reference being made to the application for more particular description. No tract in the State answered either description. The machine was burned fifteen or twenty rods from the barn, on Sec. 36, T. 33, R. 28.

Held, that the case was one of repugnant calls, and the reference to the barn controls on the principle that that description must be adhered to about which there is the least likelihood of mistake. The misdescription was one of inadvertence, and not a misrepresentation material to the risk.

Miller vs. Terry, 3 Jones, Eq., 29; Yonkers and N. Y. F. Ins. Co. vs. Hoffman F. Ins. Co., 6 Robertson (Sup. Ct.), 316; 2 Wash. R. I. (2d ed.), 631.

Held, that the reference to the section, town and range, and the phrase "stored in barn," in the application, were merely descriptive, and not a stipulation that the location should remain unchanged, nor a condition that if changed the insurance should cease or be suspended.

Smith vs. Mech. & Traders' Ins. Co., 32 N. Y., 399; Blood vs. Howard F. Ins. Co., 12 Cush., 472; Flanders on Fire Ins., 241, 255, 269, 485.

Everett vs. Continental Ins. Co., Minn. S. C., 21 Minn., 26; 4 Ins. Law Jour., 121.

8. A phaeton described in the policy as "contained in a frame barn, etc.," was destroyed while removed to a carriage shop for repairs. *Held*, that the description in the policy defining the risk is a warranty, and a removal not contemplated by the policy avoids the insurance in case of loss.

Wood vs. Hartford Fire Ins. Co., 13 Conn., 544; Hall vs. East River Mutual Ins. Co., 3 Selden, 370; Houghton et al. vs. Manuf. Fire Ins. Co., 8 Metc., 114; Boynton vs. Clinton and Essex Ins. Co., 16 Barb., 254; Annapolis and Elk Ridge R. R. Co. vs. Balt. Fire Ins. Co., 32 Md., 37.

Held, that the words must be construed with reference to the policy; they meant only that the barn was the place of deposit when not absent for temporary purposes incident to use and enjoyment of the property.

Peterson vs. Miss. Valley Ins. Co., 24 Iowa, 494; Fitchburg R. R. Co. vs. Charlestown Mutual Fire Ins. Co., 1 Gray, 64. Case of Annapolis and Elk Ridge R. R.. *supra*, distinguished.

Held, that the policy was not vitiated by a reasonable removal for repairs, even though the risk was thereby increased.

Billings vs. Tolland Ins. Co., 20 Conn., 139; Shaw vs. Roberts, 6 Ad. and Ellis, 75; Leggert vs. Aetna Ins. Co., 10 Richardson; Townsend vs. Northwestern Ins. Co., 18 N. Y., 168.

McCluer vs. Girard F. & M. Ins. Co., Iowa S. C., 43 Iowa, 349; 5 Ins. Law Jour., 743.

9. If the proposal for insurance be prepared by the agent of the company, and he misdescribes the premises with full knowledge of their actual condition, and there be no fraud or collusion between the agent and the insured, the contract may be reformed in equity.

Callet vs. Morrison, 9 Hare, 562; *In re Universal Non-Tariff Fire Ins. Co., L. R., 19 Eq., 485*; Malleable Iron Works vs. Phoenix Ins. Co., 25 Conn., 465; Woodbury Savings Bank vs. Charter Oak Ins. Co., 31 id., 517; Maher vs. Hibernia Ins. Co., 67 N. Y., 284.

But in an action at law the rights of the parties must be determined by the contract, which cannot be altered or modified by extrinsic evidence of a different agreement.

Deweese vs. Manhattan Ins. Co., 6 Vroom, 366.

Franklin F. Ins. Co. vs. Martin, N. J. S. C. E., 40 N. J., 568; 8 Ins. Law Jour., 134.

10. One of the conditions of the policy was, that "any material misdescription of any of the property proposed to be hereby insured, or of any building or place in which the property to be so insured is contained, and any misstatement of or omission to state any fact material to be known for estimating the risk, renders the policy void as to the property affected by such misdescription, misstatement, or omission respectively." The claim was resisted by the liquidator of the company on the ground that, in the description of the property for the purpose of the policy, a portion of it was described as roofed with slate, whereas that portion was roofed with felt. To this it was replied that this description was unimportant, as the property misdescribed was only of the value of £200, and not, in fact, burnt.

Held, that if the company had known of the felt roof, they would neither have refused the risk nor raised the premium; and, this being so, the misdescription was unimportant. There is no doubt that if the description is in the form of a warranty, or amounts to a warranty, it must be strictly true, or the policy will be void. "The party proposing an insurance is bound to communicate to the insurer all matters which will enable him to determine the extent of the risk against which he undertakes to guarantee the insured."

Bates vs. Hewitt, L. R., 2 Q. B., 595.

The principle applicable to the present case was that stated in Smith's Merc. Law, 8th edition, page 405—viz., "if the description of the property be substantially correct, and a more accurate description would not have varied the premium, the error is not material."

The Newcastle Insurance Company vs. M'Mullan, 3 Dow., 255; *Parsons vs. Bignold*, 15 Law Journal Reports, Chancery, 379; *Anderson vs. Fitzgerald*, 4 House of Lords, 184, 497, 502; *Donald vs. The Law Life Insurance Company*, L. R., 9 Q. B., 328; *Doe vs. Manning*, 4 Camp., 76; *Benham vs. the Guarantee Society*, 7 Exch., 744; and *Towle vs. the National Guardian Society*, 3 Giffard, 42.

In re the Universal Non-Tariff Fire Ins. Co., ex parte Forbes & Co., Vice Chancellor's Court, Eng., 4 Ins. Law Jour., 559.

WHEN AMBIGUOUS.

11. The application described the property as "hay and grain," written after the printed phrase, "Barn No. 1." The policy contained the same printed phrase, along with the written words, "Hay and grain in barns," "barns" being apparently, though not certainly, in the plural. Both documents also contained the printed phrases, "barn No. 2," "Corn, barn," etc. The application described the barn after the printed word "North," as "barn from house 10 rods." There was no barn north from a house, but there was a house north from the barn burned. The agent certified that he had personally examined the property, and that there was other insurance in a prior policy. This prior policy, and its accompanying application, located the property as in "barns," of which there were two. A survey accompanying the first application, was referred to in the second, for size of "barns," and the only barn whose measurement was there given, was the barn not burned. *Held*, that either the policy was upon the property in the place where it was burned, or the description furnished a case of latent ambiguity which it was permissible to explain by the introduction of oral testimony.

Bowman vs. Agricultural Ins. Co., N. Y. C. A., 59 N. Y., 521; 5 Ins. Law Jour., 9.

12. Where the location, exposure, etc., of the building insured, with reference to other buildings, was attempted to be fully stated in the application, with the party effecting the insurance for the company present, the question whether the failure to describe other buildings adjacent, was a misrepresentation or material to the risk, was for the jury.

Continental Ins. Co. vs. Ware, Ky. C. A., 9 Ins. Law Jour., 519.

13. Where there is such latent ambiguity in the phrasology of the description as to warrant the court in leaving to the jury the intention of the parties, their decision is final.

Robbins & Appleton vs. People's Ins. Co., U. S. C. C., N. Y.

See Cross Index for other cases bearing on DESCRIPTION.

DEVIATION.

ABSTRACT OF THE LAW.

a. It is an established rule of law that the vessel must not deviate from the proper course of the voyage in any material respect, unless justified by necessity.

Maryland Ins. Co. vs. Le Roy, 7 Cranch., 26; *Merchants' Ins. Co. vs. Algio*, 32 Penn. St., 330.

b. Necessity for deviation must be judged by the special circumstances of each case.

Stewart vs. T. M. F. Ins. Co., 1 Humph., 242.

c. The customary course of a voyage will usually determine whether there has been a deviation.

Kettell vs. Wiggin, 13 Mass., 68; *Folsom vs. Merchants' Mutual Ins. Co.*, 38 Me., 44.

d. The master is bound to adopt the most natural, safe and advantageous way under all the circumstances of the case.

Martin vs. Delaware Ins. Co., 2 Wash. C. C., 234.

e. Unreasonable and unnecessary delay may constitute a deviation.

Seaman vs. Loring, 1 Mason, 127; *Palmer vs. Marshal*, 8 Bing., 79; *Coffin vs. Newburyport Ins. Co.*, 9 Mass., 436; *Cleveland vs. Union Ins. Co.*, 8 Mass., 308; *Secor vs. Provincial Ins. Co.*, 10 Allen, 305.

f. A deviation must be voluntary as well as unnecessary.

Winthrop vs. Union Ins. Co., 3 Wash. C. C., 159; *Cruder vs. Philadelphia Ins. Co.*, 2 Wash. C. C., 262; *Wiggin vs. Amory*, 13 Mass., 118.

g. A departure necessary to save life, or to give relief in distress, is not a deviation.

Bond vs. Brig Cora, 2 Wash. C. C., 80; *Walsh vs. Homer*, 10 Mo., 6.

h. But a departure to save property is a deviation.

Bond vs. Brig Cora, *supra*; *Wiggin vs. Amory*, 14 Mass., 1.

i. A mere intention to deviate is not deviation, and the insurer is liable for loss before the dividing point is reached.

N. Y. Firemen's Ins. Co. vs. Lawrence, 14 Johns., 46; *Lawrence vs. Ocean Ins. Co.*, 11 Johns., 240.

j. A departure from the direct course is not deviation, if justified by usage.

Parsons vs. Manf. Ins. Co., 16 Gray, 463; *Union Ins. Co. vs. Tysen*, 3 Hill, 118.

DIGEST OF RECENT CASES.

DEVIATION—WHAT IS.

1. *Held*, That any unreasonable delay or delay for a purpose other than one connected with the business of the voyage, is a deviation, and in case of such delay, it is incumbent on the insured to show that it was reasonable.

Burgess vs. Equitable Marine Ins. Co., 126 Mass. 70, and cases cited. *African Merchants vs. British Ins. Co.*, L. R., 8 Ex., 154.

The declaration alleged the insurance on a specified voyage and that the vessel was lost while prosecuting it. *Held*, that in Massachusetts under an answer denying each and every other allegation than the insurance on the voyage, evidence was admissible to show a delay amounting to deviation.

Mulvey vs. Mohawk Valley Ins. Co., 5 Gray, 541; *Lincoln vs. Lincoln*, 12 Gray, 45; *Boston Relief and Submarine Co. vs. Burnett*, 1 Allen, 410; *Davis vs. Travis*, 90 Mass., 222; *Brigham vs. Aldrich*, 105 Mass., 212; *Hill vs. Cromton*, 119 Mass., 376; *Mosler vs. Potter*, 121 Mass., 89.

Amsinck et al. vs. American Ins. Co. et al., *Mass. S. J. C.*, 129 Mass., 185; 9 *Ins. Law Jour.*, 581.

WHAT IS NOT.

2. If a vessel insured for a specific voyage, goes designedly and unnecessarily in the least out of her course, or lies by and interrupts the voyage without the assent of the underwriter, this is a deviation which terminates the policy.

Defendant issued a policy on the steamboat M. at and from P. to N. Y. with liberty "to touch and stay at any ports and places, if thereunto obliged by stress of weather or other unavoidable accidents." The vessel after the commencement of the voyage, stopped at C., an interjacent port, to repair a defect in her steam chimney, which existed and was known to her owners before her departure from P. While lying at C. she was destroyed by fire (a risk insured against). In an action upon the policy, *Held*, that it was terminated by the delay at C., and defendant discharged.

Audenreid vs. M. M. Ins. Co., *N. Y. C. A.*, 60 *N. Y.*, 482.

3. The policy was "at and from Miramichi to a port in Cape Breton, and at and from thence to New York, with privilege of carrying coal exceeding her tonnage." The vessel had already cleared for Big Glace Bay, a port in Cape Breton, under a charter which provided that if the captain did not consider it safe to remain and load there he was at liberty to proceed elsewhere, and the charter was to be considered canceled. The vessel proceeded to Sydney, a safe port in Cape Breton, and remained several days. The captain going from there overland to Big Glace Bay, and deeming it unsafe for loading the vessel, proceeded to Cow Bay, a safer port in Cape Breton, and commenced to load. Sydney was an intermediate port, and it was shown to be the usage of coaling vessels to Cape Breton to stop there. *Held*, that contracts of insurance are construed in the light of established usage, which, unless excluded by express words, is deemed to be a part of the contract.

Arnould on Ins., 333; 2 Parsons on Ins., 8, and cases cited; 1 Phillips on Ins., 997.

Held, that the stoppage at Sydney was incidental to the accomplishment of the voyage to the selected port. It was not using two ports of lading.

Pelly vs. Royal Ex. Ass. Soc., 1 Burr, 348.

Underwriters must be presumed to be acquainted with the course of navigation and the practice of the trade they insure.

1 Douglass, 510; 10 Jo., 120; 4 Wend., 34; 36 N. Y., 172.

The privilege of the policy was not exhausted by going into Sydney.

Case of Hearne vs. N. E. Mar. Ins. Co., 2 Wall., 489, (4 Ins. L. J.) distinguished.

Held, that the clearance for Big Glace Bay was only *prima facie* evidence of destination, and did not preclude the right of election under the policy. A coaling port once elected and entered, though the vessel did not load there, would exhaust the policy.

11 Jo., 241; 14 ib., 55.

Held, that the election to go to Cow Bay was not a deviation.

McCall vs. Sun Mutual Ins. Co., N. Y. C. A., 66 N. Y., 506; 6 Ins. Law Jour., 56.

4. Where the contract of insurance on a steamboat, stipulates for its continuance for one year "unless it is terminated or made void by conditions hereinafter expressed," and contains a "permission to navigate the Ohio and Mississippi Rivers below Cairo, and also under the head of "warranted by the assured," provides among other things, "that said vessel shall be run and navigated upon the aforesaid privileged waters, as is usual for boats of her class, in the usual prosecution of business. *Held*, that this was not a warranty that the insured will not take the boat out of the permitted waters, whose legal effect was to avoid the policy in case of deviation; it contains no condition expressly avoiding the policy for navigating the boat outside of the permitted waters, and the boat made a trip outside of these permitted waters and returned in safety, where she was afterward destroyed by fire, in no way caused or contributed to by such departure.

1 Duer on Ins., sec. 5, p. 161; Campbell vs. New Eng. Mut. Ins. Co., 98 Mass., 5, 391; Thwing vs. Great Western Ins. Co., 103 Mass.; U. S. F. & M. Ins. Co. of B. vs. Kimberly, 34 Md., 231, 232; 16 B. Mon., 258, 259; Laberee vs. Carleton, 53 Me., 212, 213; Merrifield vs. Colleigh, 4 Cush., 184, 185; Robertson vs. French, 4 East., 130; Howe vs. Mut. Safety Ins. Co., 1 Sandf., 151; Palmer vs. Warren Ins. Co., 1 Story, 365; 1 Parsons on Mar. Ins., chap. 4, sec. 9.

Held, that a deviation does not have the same effect in a time policy as in a voyage policy; the only effect of such deviation was to relieve the insurer from any loss happening outside of the permitted waters; that said policy was not avoided thereby, and that after a temporary departure and return in safety to the permitted waters, the insurers are liable for a subsequent loss covered by the policy, not caused or contributed to by such deviation.

1 Arnould on Ins., 333, 409, 412; Hopkins's Manual of Ins., p. 174; Capin vs. Wash. Ins. Co., 12 Cush., 537; 2 Parsons, Mar. Ins., pp. 1, 5, and note 2; Coffin vs. Newburyport Mar. Ins. Co., 9 Mass., 436, 449; Greenleaf vs. St. Louis Ins. Co., 37 Mo., 30; Palmer vs. Warren Ins. Co., 1 Story R., 364, 365, 366; 98 Mass., 391; Case of Com. Mut. Ins. Co. vs. Stevens, 2 Parsons, p. 5, note 3, distinguished.

Wilkins vs. Tobacco Ins. Co., O. S. C. C., 30 O., 317; 6 Ins. Law Jour., 409.

5. The vessel was insured "at and from Plymouth to the Banks, cod-fishing, and at and thence back to Plymouth." Only a part of the necessary bait was taken, it being expected that the rest

could be procured at the Banks. This was found to be impossible on arrival at the Banks, and the vessel went to St. Peters, over 100 miles distant, to secure the necessary supply. There was no evidence of such a usage in this class of voyages. *Held*, that going to St. Peters was a departure from the voyage described in the policy.

Cases of *Friend vs. Gloucester Ins. Co.*, 113 Mass., 326, and *the Tarquin*, 2 Lowell, 358, distinguished.

Held, that in order to justify such a departure, the necessity must arise from some peril in the prosecution of the voyage within the limits named in the policy, and not in the prosecution of the business for which the voyage was undertaken.

Stocker vs. Harris, 3 Mass., 418; *Brazier vs. Clapp*, 5 Mass., 1; *Coffin vs. Newburyport Ins. Co.*, 9 Mass., 436, 449; *Kettell vs. Wiggin*, 13 Mass., 68; *Williams vs. Shee*, 3 Camp., 469; 1 Arnould on Ins., §§141, 142.

Any delay for the prosecution of other business, or any unreasonable delay in prosecuting the business of the voyage at a place permitted, is a deviation.

African Merchants' Co. vs. British and Foreign Marine Ins. Co., L. R. and Ex., 154.

But if the delay was necessary in order to accomplish the objects of the voyage, and was reasonable under the circumstances of the case, then there is no deviation.

Ins. Co. vs. Catlett, 12 Wheat., 383; *Phillips vs. Irving*, 7 M. & G., 325; *Kittell vs. Wiggin*, 13 Mass., 68; *Robertson vs. Columbia Ins. Co.*, 8 Johns., 489. Cases distinguished of *Green vs. Pacific Ins. Co.*, 9 Allen, 216; *Stoker vs. Harris*, 3 Mass., 409.

Held, that the vessel might have delayed any reasonable time on the Banks to procure bait, but the departure for that purpose was a deviation which avoided the policy.

Noble vs. Kumoway, 2 Doug., 510, 513.

Burgess vs. Eq. Mar. Ins. Co., Mass. S. J. C., 126 Mass., 70; 8 Ins. Law Jour., 103.

REFORMATION IN CASE OF.

6. Where equity declines to reform a contract to allow the use of two ports instead of one, adjudging that there was a deviation, it will not decree a return of the premium. The law annuls the

contract as to the future, and forfeits the premium. Here equity must follow the law.

Hearne vs. N. E. Mut. Mar. Ins. Co., U. S. S. C., 4 Ins. Law Jour., 582.

7. When a company insures the charter of a vessel after being informed that no copy of the charter has been received, and it is not known how many ports she will be required to use, and through mistake the policy is so written as to limit the vessel to the use of one port, when her charter actually requires two, a court of equity will order the contract reformed to describe the voyage correctly.

National Traders' Bank vs. Ocean Ins. Co., Me. S. J. C., 4 Ins. Law Jour., 214.

See Cross Index for other cases bearing on DEVIATION.

DIRECTORS.

ABSTRACT OF THE LAW.

a. Directors are liable to the insured for misrepresentations which induced him to insure, when made with their knowledge and consent.

Salmon vs. Richardson, 30 Conn., 860; Tibbetts vs. Hamilton Mut. Ins. Co., 5 Allen (Mass.), 569.

b. The liability of directors will be strictly enforced.

Kahn vs. Jones, 2 Ins. L. J., 514.

See further on this subject under ASSESSMENTS, INSOLVENCY, MUTUAL COMPANY, OFFICERS.

DIGEST OF RECENT CASES.

DIRECTORS—POWERS AND LIABILITIES OF.

1. Suit was brought by William Hanna et al. against the Andes Ins. Co., to recover upon five different claims, amounting in the aggregate to \$10,000. On the part of the plaintiffs it was alleged that sundry parties had insured their property in the

Andes ; that the property was destroyed by fire ; that each of the insured had transferred his claim to the plaintiffs, who were entitled to recover the full amounts of the policies. In answer, the defendants admitted the issue of the policies, but claimed that the parties who held them had not complied with the terms and conditions therein ; and further, that each claim was settled through an employee of the company, who had effected a compromise at fifty cents on the dollar, which had been paid ; that Hanna, all this time, had been a director of the company, and had paid nothing to the employee except the expense and a small commission for settling the matter, and that all these facts were known to the plaintiffs, who had no right to recover. The plaintiffs demurred to the answer : First, that the allegation that the defendant had settled by an employee was not sufficient, inasmuch as it was not alleged that the employee held a position of trust and confidence, and was employed specially to settle these claims ; second, that the defendant had no right to settle the claims by compromise—that the company owed the debt and was bound to pay it.

The court held that the allegation that the defendant, through an employee, settled the case, was sufficient, and that it was fair to presume that the employee was duly authorized to make such settlement. As to the allegation that the company had no right to speculate upon the claims of the policy holders—that if it owed a debt it was bound to pay it—the court would sustain such a compromise if it was shown there was no fraud, and fraud was not charged in this case. The principal point made, however, was that Hanna, who was a director of the company, knew all the facts, and had no right to purchase the claims from an employee. If the employee did settle for the company, and took an assignment in blank, and Hanna, or any other person, aware of that fact, permitted his name to be put in the assignment, he could receive nothing as against the company, if they had in fact settled the claims, because the assignment itself would be void. As a director, he had no right to purchase a claim of this kind against the company, even if it were a valid one. His position was one of great trust and confidence, and he would not be permitted to speculate on the company's affairs. Neither could he buy a claim that had been compromised and recover in full against the com-

pany. If this were permitted it would open a door for fraud. While it might be to the interest of the company, and it had a right to compromise a claim where there was a just and reasonable defense to it, it would be the interest of the director owning the claim to oppose any settlement of that kind, and to recover against the company the whole amount, so that his position would be such as to place him directly in antagonism to the very object for which he was placed there by the stockholders of the corporation. If a director has no right to purchase, no other person has a right to enter into partnership with him for the purchase of a claim against a company. The utmost that he can claim is that, as trustee for the company, he is entitled to what he has paid.

Hanna et al. vs. Andes Ins. Co., Sup. Court, Hamilton Co., Ohio, 4 Ins. Law Jour., 396.

2. Directors of a corporation are required to show reasonable capacity for the position, scrupulous good faith, and the exercise of their best judgment. Directors who act in good faith and with reasonable care and diligence, but nevertheless fall into a mistake, either of law or fact, are not personally liable for the consequence of such mistake. The by-laws of a corporation provided that the board of directors should elect a secretary, whose term of office should be twelve months or until his successor was elected, and who was to give bond with security for the faithful discharge of his duties. The board elected a secretary, and took the prescribed bond, and re-elected the same person secretary for several successive years, but took no new bond, supposing, after consideration and discussion of the question, but without taking legal advice, that the bond taken was a continuing security during those years. The secretary became a defaulter in the third year. *Held*, that the directors, who were good and efficient business men, stockholders of the corporation, and acting in good faith, were not liable to make good the loss. But ordinarily advice of counsel will not protect a trustee.

Perry on Trusts, § 927; Kendrick vs. Cypert, 10 Humph., 291.

Vance vs. Phoenix Ins. Co., Tenn. S. C., 10 Ins. Law Jour., 43.

3. A custom or understanding of insurance companies as to the

power of their general agents to bind the company to an agreement for insurance, even if established, would be of no avail to a director of the company, as he is conclusively presumed to know the powers of the agent and the rules and usages of the company. Whatever may be the implied powers as to strangers, a director of the company must stand upon the actual powers of the agent, and must abide by the rules and usages of his company.

Patterson et al. vs. Ben Franklin Ins. Co., C. P. of Allegheny Co.; 4 Ins. Law Jour., 938.

See Cross Index for other cases bearing on DIRECTORS.

DOUBLE INSURANCE.

See OTHER INSURANCE.

DWELLING.

ABSTRACT OF THE LAW.

a. In the absence of any special stipulation to the contrary, the fact that the principal use of the building is for residence purposes, and that by fair construction it may be so designated, will constitute it a dwelling within the meaning of the policy. The use of some limited portion as a workshop, storehouse, or for some other purpose not strictly germane to a residence, will not work a forfeiture. But if the term does not by fair construction indicate the real character of the building, the use of a limited portion for occupancy will not constitute a dwelling.

Billings vs. Tolland Co., Mut. Ins. Co., 20 Conn., 139; Friedlander vs. London Ass. Co., 1 M. & R., 171; Cerf. vs. Home Ins. Co., 44 Cal., 320; White vs. Mut. &c., Ass. Co., 8 Gray (Mass.), 566; Dobson vs. Sotheby, 1 M. & M., 90.

b. A subsequent change of use or of tenants will not, in the absence of any stipulation to the contrary work a forfeiture, unless the risk be essentially changed.

N. G. F. & M. Ins. Co. vs. Wetmore, 32 Ill., 221; Herron vs. Ins. Co., 28 Ill., 235; Gates vs. Madison Co., Mut. Ins. Co., 1 Selden, 469.

c. The term "dwelling" is merely descriptive of the general purpose for which the property is used, and not a representation of present occupancy, nor is the term "occupied dwelling" a warranty of future occupancy.

Soye vs. Ins. Co., 6 La. An., 761; *Joyce vs. Maine Ins. Co.*, 45 Me., 163; *Herrick vs. Union Mut. F. Ins. Co.*, 48 Me., 558.

d. Mere vacancy is not *per se* an increase of risk if of a temporary character. *Gamwell vs. Farmers' Mut. F. Ins. Co.*, 12 Cush. (Mass.), 167.

e. The description of the premises, however, simply as a dwelling when they are in part occupied for a purpose which by the terms of the contract increases the risk, will work a forfeiture.

Lappin vs. Charter Oak Ins. Co., 58 Barb., 325; *Sarsfield vs. Ins. Co.*, 61 Barb., 479.

f. The dwelling includes everything appurtenant and necessary to the main building, but not unfinished materials in no way connected with it, but simply intended to be incorporated,

Workman vs. Ins. Co., 2 La., 507; *Ellmaker vs. Ins. Co.*, 5 Penn. St., 183.

See further on this subject under BUILDING, DESCRIPTION, POLICY, RISK, REPAIRS, USE, VACANT.

See Cross Index for cases bearing on DWELLING.

EMBEZZLEMENT.

DIGEST OF RECENT CASES.

EMBEZZLEMENT—LIABILITY FOR.

1. A company may recover direct damages from an officer through whose negligence, subordinates embezzle funds.

Standard Mar. Ins. Co. vs. Dick, Liverpool Eng. Circuit.

See Cross Index for other cases bearing on EMBEZZLEMENT.

ENCUMBRANCE.

See INCUMBRANCE.

ENTIRE AND SEPARABLE CONTRACT.

ABSTRACT OF THE LAW.

a. Where the policy is for a single gross sum on different items, the general rule is that a breach which works a forfeiture as to a part, forfeits as to the whole, the contract being indivisible.

Lee vs. Howard F. Ins. Co., 3 Gray (Mass.), 583; *Gould vs. Ins. Co.*, 47 Me., 403; *Friesmuth vs. Ins. Co.*, 10 Cush. (Mass.), 587; *Barnes vs. Union Ins. Co.*, 51 Me., 110.

b. When the insurance is for separate sums, the authorities are not agreed whether a forfeiture of part avoids the whole; a distinction has sometimes been made between grounds of forfeiture which increase the risk as to all or are chargeable to fraud, and such as have not these characteristics.

Associated Farmers' Ins. Co. vs. Assum, 5 Mo., 165; *Burrill vs. Ins. Co.*, 1 Edm., Sel. Cas. (N. Y.), 233; *Rowley vs. Empire Ins. Co.*, 3 Keyes, 577; *Kimball vs. Howard F. Ins. Co.*, 8 Gray (Mass.), 33; *Lovejoy vs. Augusta M. F. Ins. Co.*, 45 Me., 472; *Gottzman vs. Ins. Co.*, 56 Penn. St., 210; *Com. Ins. Co. vs. Spankneble*, 52 Ill., 53.

See further on this subject under ALIENATION, INCUMBRANCE, RISK, TITLE.

See Cross Index for cases bearing on ENTIRE AND SEPARABLE CONTRACT.

EQUITABLE RELIEF.

ABSTRACT OF THE LAW.

a. Equitable relief may be obtained where an action at law will not furnish a perfect remedy, where the contract as written does not embrace the real contract as made, where the insurer refuses to deliver the written contract where fraud has been used either in obtaining or the execution of the contract, or in obtaining judgment, and where the officers of a mutual company refuse to apply the funds in their hands to the payment of the loss.

Globe Mut. Ins. Co. vs. Reals, 48 How. Pr. (N. Y.), 502; *Harris vs. Columbian Ins. Co.*, 18 Ohio, 116; *Ins. Co. vs. Bailey*, 13 Wall. (U. S.), 616; *Chase vs. Washington Ins. Co.*, 10 Barb. (N. Y.), 565; *Scott vs. Eagle F. Ins. Co.*, 7 Paige (N. Y.), 198; *Ocean Ins. Co. vs. Field*, 2 Story (U. S.), 59.

See further on this subject under REFORMATION.

DIGEST OF RECENT CASES.

EQUITABLE RELIEF—WHAT IS NECESSARY TO.

1. Equity will not declare a policy void subsequent to a loss, on the ground of fraud, where it is claimed that the insured procured the policy for the sake of firing the building, and did so fire it; but it does not appear that any fraudulent device was resorted to in procuring the insurance, or that it was not a proper risk to be assumed. Nor is it a ground for relief, that numerous suits in attachment have been commenced against the insured, and the company summoned in each case as garnishee. The practice of the court will allow the several actions to be consolidated into one on proper showing.

Gillilan vs. Nixon, 26 Ill., 50; Stahl et al. vs. Webster et al., 11 Ill., 571.

And were it otherwise, the company must first establish its defense at law, when chancery will interpose to prevent the right from being farther vexatiously litigated.

Imperial Fire Ins. Co. vs. Gunning, Ill. S. C., 5 Ins. Law Jour., 760.

See Cross Index at end of volume, for other cases bearing on EQUITABLE RELIEF.

ESTOPPEL.

See WAIVER.

EVIDENCE.

ABSTRACT OF THE LAW.

a. Parol evidence may be introduced not to vary the written contract, but to show a waiver of its conditions through the knowledge actual or presumptive of the insurer or his agent.

May vs. Buckeye Ins. Co., 25 Wis., 291; Combs vs. Hannibal Sav. and Ins. Co., 43 Mo., 148;

Campbell vs. Merchants' etc. Ins. Co., 37 N. H., 35; **Atlantic Ins. Co. vs. Wright**, 22 Ill., 462; **Aurora F. Ins. Co. vs. Eddy**, 55 Ill., 213.

b. Parol evidence is competent to show the value of property through witnesses capable of judging, and also the amount of such property.

Fowler vs. Old North State Ins. Co., 74 N. C., 89; **Howard vs. City F. Ins. Co.**, 4 Den. (N. Y.), 502.

c. Evidence which does not affect the value for which the insurer is liable, is not admissible.

Savage vs. Conn. Ins. Co., 36 N. Y., 655; **Niblo vs. N. A. Ins. Co.**, 1 Sand. (N. Y.), 551.

d. The burden of proof is usually on the insured to show the authority of the agent whose knowledge is relied upon as a waiver.

Home Ins. Co. vs. Woodworth, 81 Penn St., 233.

e. Evidence is inadmissible to show limitations upon the power of the agent not within the real or constructive knowledge of the insured.

Lightbody vs. N. A. Ins. Co., 23 Wend. (N. Y.), 18; **Viele vs. Germania Ins. Co.**, 26 Iowa, 9; **Farmers' Ins. Co. vs. Taylor**, 73 Penn St., 342.

f. Evidence of similar acts on the part of the agent with consent of the company is admissible to show his authority.

Lightbody vs. N. A. Ins. Co., *supra*.

g. Oral evidence is admissible to explain an ambiguity in the policy, but not to show a usage in contradiction to the plain terms of the contract.

Clinton vs. Hope Ins. Co., 45 N. Y., 460; **Partridge vs. Ins. Co.**, 15 Wall. (U. S.), 373.

h. Usage, however, may be shown as a waiver of the conditions of the contract.

Hazard vs. N. E. M. Ins. Co., 8 Pet. (U. S.), 557.

i. Evidence of experts is admissible only as to matters peculiarly within their knowledge.

Joyce vs. Me. Ins. Co., 45 Me., 168; **Jefferson Ins. Co. vs. Cotheal**, 7 Wend., 72.

j. Evidence must generally be confined to the facts, opinions being left to the jury.

Jefferson Ins. Co. vs. Cotheal, *supra*.

k. The burden of proof is on the insured to show compliance with all the conditions of the contract, and in general all matters precedent to his right to recovery.

Campbell vs. N. E. Ins. Co., 97 Mass., 590; **Heehner vs. Eagle Ins. Co.**, 10 Gray (Mass.), 131.

l. But the burden of proof is on the insurer with regard to such matters as amount simply to representations or conditions subsequent.

Clark vs. Hamilton Ins. Co., 9 Gray (Mass.), 148; **Catlin vs. Springfield F. Ins. Co.**, 1 Sum. (U. S.), 435.

m. Proofs of loss are not admissible to show its extent, but simply their own execution.

Knickerbocker Ins. Co. vs. Gould, 80 Ill., 368.

n. In matters relied upon as an avoidance, the burden of proof is usually on the insurer.

Catlin vs. F. & M. Ins. Co., 1 Sum. (U. S.), 434.

DIGEST OF RECENT CASES.

EVIDENCE—WHAT IS COMPETENT OR ADMISSIBLE.

1. It is not a valid objection to the admission of the policy as evidence by the insured, that the declaration counted on a policy of a corporation existing under the laws of another State, and the execution of the policy had not been proved.

Peoria Mar. & Fire Ins. Co., vs. Perkins, 16 Mich., 380; The People vs. John, 22 Mich., 461.

Nor was it incumbent on the insured as preliminary to introducing the policy to show that the company was not acting illegally in insuring property within a State where it was not authorized. It was to be presumed as against the company, in the absence of proof to the contrary, that the contract was effected legally and in good faith. Nor was it fatal to the admission of the policy that a special count in the declaration stated under a videlicet that the contract was made in the city of B., whereas the true place was in another State, so long as nobody was misled.

Mistyn vs. Fabrigas, and notes; Smith's L. C. Tidd's Prac., 4th ed., 363; Spencer's Eq. J., 699.

Where the policy insured P. as sole and unconditioned owner, "loss, if any, payable to S., as his interest may appear," and further provided that it should be void if P. was not such sole and unconditioned owner, *Held*, that where the whole declaration was constructed on the theory that the plaintiff P. possessed the entire interest, the introduction of the expression, "for the use and benefit of" S. in the declaration had no effect to vary the issue from what it would have been if the phrase had been omitted. *Held*, that the occurrence of the expression in the policy did not necessitate proof of any interest by S. in the insured property.

Clay Fire & Mar. Ins. Co., vs. Huron Salt and Lumber Mfg. Co., Mich. S. C., 31 Mich., 346; 4 Ins. Law Jour., 858.

2. The burden of proof is on the affirmative, and that party must fail in an even balance of evidence. But the balance depends on the general strength of the evidence and the credibil-

ity, not the number of witnesses. A contract of insurance affirmed by one witness and denied by another was properly submitted to the jury for their determination of the fact. Where the testimony of one witness denying that he had made a contract or a memorandum, was contradicted by another, it was admissible to impeach the evidence of the first by evidence of the second, that the first had told him he had made a memorandum. ¶

Angel vs. Hartford Fire Ins. Co., N. Y. Com. A., 59 N. Y., 171; 4 Ins. Law Jour., 427.

3. The fact that the witnesses referred to invoices and other papers to assist them in remembering the articles and prices, does not necessarily give the statement the character of a copy or of secondary evidence. The point of the matter is, that they swear to the statement as their own work, made out from their knowledge of the facts. One may know that he received and had the articles set forth in a certain invoice, and that these articles, or a certain number of them, were destroyed by the fire, and yet be unable to remember the items without the assistance of the invoice to refresh the memory. In all cases where accounts are multitudinous, the rule as to the personal knowledge of the witness is relaxed. He must be permitted to put the items into an account, and to refresh his recollection by means of other accounts and papers as to the items.

Alleghany Ins. Co. vs. Hanlon, Pa. S. C., 4 Ins. Law Jour., 393.

4. Where the purchase of new machinery was the occasion of obtaining additional insurance, evidence of the purchase was admissible as *res gestæ* in an action on the policy. A court is not obliged to so charge a jury as to confine them to the consideration of the testimony of one witness rather than another.

Westchester Fire Ins. Co. vs. Earle & Reynolds, Mich. S. C., 33 Mich., 14; 5 Ins. Law Jour. 61.

5. The testimony of experts, especially underwriters, as to nationality, is admissible, and where such testimony is undis-

puted, it must be accepted and govern as to the question of materiality.

3 Kent's Com., 284.

Leetch vs. Atlantic Mutual Ins. Co., N. Y. C. A., 66 N. Y., 100; 5 Ins. Law Jour., 775.

6. The policy provided, "that anything less than a distinct agreement indorsed on this policy shall not be construed as a waiver of any written or printed condition, restriction, or stipulation herein contained." *Held*, that parol evidence was admissible in law as well as equity to show that the president of the company gave oral consent to the removal of the goods to another building, and told the insured that it would not be necessary to bring his policy, and such action by the president estopped the company from setting up the policy clause as a defense.

National Fire Ins. Co. vs. Crane, 15 Md. Rep., 260; Wilkinson's Case, 13 Wallace, 222; May on Ins., § 502.

Maryland Fire Ins. Co. vs. Gusdorf, Md. C. A., 5 Ins. Law Jour., 384.

7. Certified copies of the proceedings in a bankruptcy case are competent evidence of the facts stated therein, though not purporting to be a copy of the whole record of the case. The proceedings in such case do not merely constitute one integral record, but may be authenticated as separate records.

Michener vs. Payson, assignee, U. S. S. C., 5 Ins. Law Jour., 116.

8. Certificates and licenses from the State Commissioner's office are good evidence, so far as they go, of a company's right to do business in Michigan. Where it is not shown that a premium note or policy sued on by the company, was made in a particular county, evidence of the company's authority to do business in that county is unnecessary.

American Ins. Co. vs. Woodruff, Mich. S. C., 34 Mich., 6; 5 Ins. Law Jour., 668.

9. Every presumption is to be indulged in favor of a judgment, and a court of review will not look into the evidence to find a fact for the purpose of reversing a judgment. A party relying upon facts not found, has ample remedy. If conclusively proved,

he may request a finding, and a refusal will be available. If not conclusively proved, a denial of a motion for a finding by the court below is reviewable on appeal. Evidence of custom among those engaged in insurance, if competent to explain the conduct of the parties, and how they regarded a verbal arrangement for an increase of premium, and the acts necessary for its consummation, is admissible. Entries upon a broker's books bearing upon the fact of a mistake in the cancellation of a policy and upon his credibility, were admissible.

Standard Oil Co. vs. Triumph Ins. Co., N. Y. C. A., 64 N. Y., 85 ; 5 Ins. Law Jour., 594.

10. In a case of contributing policies, adjustments by an expert may be submitted, not as evidence of the facts stated therein, or as obligatory, but for the purpose of assisting the jury in calculating the amount of liability upon the several hypotheses of fact mentioned in the adjustment, if they find either hypothesis correct. The admission of irrelevant evidence will not disturb a judgment if not misleading. A letter written as an offer of compromise to the company by the insured, is not admissible in a suit for recovery of a loss.

Home Ins. Co. vs. Baltimore Warehouse Co., U. S. S. C., 6 Ins. Law Jour., 39.

11. Oral evidence is competent to show a mistake in reducing the contract of insurance to writing. A letter purporting to inform appellee that his policy had been forfeited, was not prejudicial as tending to show the writer to be the agent of the company in the absence of any direct evidence. A refusal to allow the agent to state, to the best of his belief, what the contract was, could not be prejudicial where he had already substantially covered the same ground. Where there was no evidence that instructions of the company to the agent were known to the insured, they were properly excluded. Evidence of custom of insurance companies was not proper unless it appeared that the contract was entered into with reference to such custom.

Continental Ins. Co. vs. Randolph, Ky. C. A., 10 Ins. Law Jour., 387.

12. For the purpose of avoiding a continuance, it was agreed that certain admissions should be made, and might be used as competent for evidence. One of the admissions by plaintiff was that the papers at the custom-house would show that the bill of sale of the vessel from the insured to B. was absolute on its face, and was made after the policy was issued and before loss, and that the paper now stands. *Held*, that the insured is not precluded by the admission from showing that the transaction, though absolute on its face, was in fact a mortgage.

National Ins. Co. vs. Webster, Ill. S. C., 83 Ill., 470; 6 Ins. Law Jour., 535.

13. An offer to show that the company did not sustain the alleged losses for the payment of which the assessment in controversy was made; or, if so sustained, that they had been paid by assessments made and collected prior to the assessments in question, should be made in clear and specific terms. If the insured can show fraud or clear mistake in making the assessments, it will constitute a defense.

Jones vs. Sisson, 6 Gray, 288; People's Equitable Mutual Fire Ins. Co. vs. Stone, 9 Allen, 483; Hummel & Co.'s Appeal, 28 P. F. Smith, 320.

Buckley et al. vs. Columbia Ins. Co., Pa. S. C., 83 Pa., 298; 6 Ins. Law Jour., 636.

14. Any parties acquainted with the value of property are competent witnesses to prove its worth, and it is for the jury to estimate the value of their testimony.

Lycoming Fire Ins. Co. vs. Jackson, Ill. S. C., 83 Ill., 302; 6 Ins. Law Jour., 305.

15. The agent, Worthington, had forwarded the preliminary proofs by post to the defendant company, and had received a letter in reply by due course of mail from the president, objecting to the payment. *Held*, that the letter was admissible as evidence without proof of the president's signature.

Overstone vs. Wilson, 2 Carr & Kirw., 1; 1 Greenleaf Ev., sec. 573a; Casey vs. Pett, Peake's Add. Cases, 130; 2 Phillips Ev., p. 503, note 481, and p. 599; Tifford vs. Knox, 2 Johns. Cases, 210; 8 Pick., 143.

The rental of a building at the time of its destruction is evi-

dence bearing upon the question of loss, but its rental at the time of its erection, two years previous, is too remote.

Cumberland M. P. Co. vs. Schell, 29 Penn., 31.

Parol testimony to show that the company never insured unoccupied property, was inadmissible.

Atlantic Ins. Co. vs. Manniny, Col. S. C., 7 Ins. Law Jour., 157.

16. In an action by the owners of a steamboat against an insurance company, on a policy against perils in the navigation of specified privileged waters, for the loss of the vessel occasioned by encountering an unknown cause of peril, from which she suddenly sprang a leak and sank while navigating a privileged water, it is not competent in chief to give in evidence, for any purpose, specific cases of other steamboats that had been lost while navigating the same and other Western rivers, occasioned by some unknown injury causing them to suddenly leak and sink.

1 Greenleaf, sec. 52.

When a steamboat is shown to have been seaworthy at the time she was insured, and no intervening circumstance occurs to render her unseaworthy, her seaworthiness is presumed to continue; but when during the life of the policy she springs a dangerous leak without apparent cause, a new presumption arises, that of unseaworthiness; yet as this new presumption is not a conclusive one, the owners are not required, to entitle them to recover for the loss, to show the identical cause of her loss, but may show a probable one. In a case of loss from some unknown cause, a person conversant with steamboat navigation, and who is from actual experience familiar with the perils attending steamboat navigation on the privileged waters and others of the Western rivers, may give his opinion, and say whether a steamboat, while being navigated thereon with ordinary skill and care, might, without apparent or known cause, suddenly spring a leak and sink from some unknown peril of the river. A person experienced in the navigation of steamboats used to carry cotton on the Western rivers known as "cotton boats," may, when speaking from personal knowledge and experience, say whether such boats, when freighted with cotton, usually leak and require the daily use of

pumps to keep them free from water, as tending to show how the words "tight and sound," used in the policy, were understood by the parties. When the actual effect of a known agency is unknown, and the opinion of one familiar, by actual observation, with the matter under consideration, is the best testimony the subject matter to be investigated affords, the opinion of such person may be received as testimony; hence it was competent to receive as testimony the opinion of skilled river navigators familiar with the subject, as to the effect the wave-swells made by a larger steamboat would have upon a smaller and heavily laden one while passing. The statements of a steamboat captain, made in the discharge of his duty as commander of the vessel while she is in a sinking condition, and he is in the act of seeking aid of another to relieve her from present peril of loss, as to her perilous condition—how and where she was leaking—made under such circumstances, his statements accompanying his acts and explanatory of them are *res gestæ*, and therefore competent testimony.

The *Manchester*, 8 Eng. Adm. Rep., 62; 14 N. H., 101; O. S., 26; 1 Greenleaf, §§ 113, 440; Story on Agency, §§ 134, 135; 4 Cush., 93; 34 Barb., 256; 6 Barb., 79; 4 Seld., 497; 12 Wheat., 460.

Western Ins. Co. vs. Tobin et al., O. S. C. C., 32 O., 77; 7 *Ins. Law Jour.*, 347.

17. The question at issue was as to the amount of damages. The plaintiff insured, testified that "the agent, after examination of the premises, proposed to take it at a valuation of \$2,500, the same mentioned in the insurance policy." *Held*, that the testimony not being in conflict but in conformity with the policy, did not come within the rule that parol testimony is inadmissible to vary a written instrument.

Crawford vs. Jarrett, 2 Leigh., 630; *Watson vs. Hunt*, 6 Gratt., 633, distinguished.

Evidence of what transpired between the agent and another party concerning the insurance of the latter's house, and the valuation fixed on it, was *res inter alios acta*, and ought on objection to have been excluded, but its admission would not call for a reversal unless prejudicial to the adverse party. Though on the evidence the court would have found a smaller amount of damages, and fixed the valuation at a smaller sum than the jury,

where there was evidence tending to show that the amount of damages was equal to the amount found, the finding will not be disturbed.

Southern Mut. Ins. Co. vs. Trear, Va. S. C. A., 7 Ins. Law Jour., 463.

18. A party who has never had the custody, or been entitled to possession of a policy of insurance, may introduce secondary evidence of its contents, upon proof that the policy had been surrendered by the holder, and was then in the custody of the insurer in a foreign country. To support an action for money had and received, it is always incumbent on the plaintiff to show that the defendant has money which *ex equo et bono* belongs to the plaintiff. Where the plaintiff bases her right of recovery in action for money had and received, upon the grounds that the defendant, who was bailee of plaintiff's piano, effected a policy of insurance on it, and the piano having been destroyed by fire, afterward collected money from the insurer, which he failed to pay over—the plaintiff must not only show that the particular piano was covered by the insurance, but also that the defendant received money or its equivalent from the insurer for its loss, and any legal evidence going to show the non-existence of either of these facts, may be introduced by the defendant. Thus, where a plaintiff relies on a policy of insurance effected by defendant on certain described goods, and all "other goods kept for sale, their own or held in trust," etc., to show that the particular piano was insured—the defendant may show that the terms "held in trust," related to goods for sale on commission which he had bound himself to insure, and not to other goods not on sale, which he had not agreed to insure, and did not in fact insure. So also the defendant may show that in making proof of loss the particular piano was not included, and nothing was in fact paid on it. A policy of insurance is not more open to the introduction of parol evidence which will vary or contradict its terms than any other contract; but the general principle which excludes parol evidence to alter or vary a writing, is confined in its operation to parties to the writing, and has no application when it is drawn in question in a controversy with one who is a stranger to it. Where a party having

in his possession goods held in trust which he was bound to insure, and also goods of that character which he was under no duty and had no authority to insure, effects insurance on all goods held in trust—parol evidence that the insurance was effected only on the goods he was under obligation to insure, is not objectionable on the ground that it varies or contradicts the written contract; such evidence simply gives application to the general words of the policy.

Snow et al. vs. Stoutz, Ala. S. C., 7 Ins. Law Jour., 483.

19. It is competent to show that the agent who effected the insurance had knowledge of the property, and a conversation between the insured and a third party in presence of the agent is admissible for this purpose; it is incumbent on the party objecting to show that such conversation could not have been heard by the agent.

Boutelle vs. Westchester Fire Ins. Co., Vt. S. C., 51 Vt., 4; 7 Ins. Law Jour., 781.

20. It is competent for a respondent to prove that the application was the paper of the agent, and not of the insured, and that the latter did not know its contents at the time of signature, and that they did not correspond with his statements to the agent. Where the agent had only testified in a general way that he had filled up the application according to the answers of assured, the exclusion of a specific question whether he had suppressed a statement of incumbrance on the ground of repetition was error. Objection that a question was leading cannot be raised for the first time on review.

Wilson vs. Moonan, 35 Wis., 321.

It was error to exclude a question to the agent as to what respondent said on making the application.

Hanson vs. Milwaukee Mech. Mut. Ins. Co., Wis. S. C., 8 Ins. Law Jour., 761.

21. Where the testimony of one of the insured parties was attacked, in the action for recovery upon the policy, by proof of declarations made by him during the fire, and being recalled, testified that such declarations were made while excited and con-

fused by the fire, without reflection ; *Held*, that other declarations made by him to another witness during the fire, as to the state of his mind, were contemporaneous with the first, and admissible in evidence. Evidence, in such case, that shortly after the fire he was in such condition as to excite the attention of one of his friends, who, in consideration thereof, advised him to take a drink of liquor, was relevant and admissible.

McCraw vs. Old North State Ins. Co., N. C. S. C., 78 N. C., 149 ; 8 Ins. Law Jour., 445.

22. Objections to extracts read from legal authorities in requested written instructions, are purely technical, and it must be shown conclusively that they were not incorporated in the manuscript. An impeached witness may be a competent witness to impeach the witness by whom he was impeached. The impeachment affects merely his credibility, and is for the jury to consider. A finding for the insured for only half the valuation, does not show that there was, in the judgment of the jury, such an excessive valuation as must have been fraudulent. The finding must have been based on an honest over valuation.

Citizens' F. & M. Ins. Co. vs. Short, Ind. S. C., 62 Ind., 316 ; 8 Ins. Law Jour., 126.

23. On an issue whether a misdescription of insured premises caused the insurance to be effected at a lower premium than would otherwise have been charged, the company's agent, through whom the policy was issued, was permitted to swear to his opinion as to the rate at which he could have procured insurance of the premises, as they were, from other companies, and his knowledge as to the rate actually charged by other companies for insurance of buildings of similar character. *Held*, that the evidence was admissible at the discretion of the trial judge.

Martin vs. Franklin Fire Ins. Co., N. J. S. C., 9 Ins. Law Jour., 477.

24. In Michigan a notice given with the plea of general issue that evidence of fraud would be shown, is sufficient to authorize the introduction of such evidence. Evidence to show that the insured had valuable property of his own and of near relatives in

the house, not covered by the policy, is admissible to controvert the allegation of arson. Evidence of statements of insured previous to the loss, of his intended movements at the time of fire, is inadmissible.

Elliott vs. Van Buren, 33 Mich., 49.

Evidence of statements of plaintiff showing that he had loose notions regarding the destruction of insured property, and tending to show that he burned it, are admissible and have weight according to the nearness of time when made.

Farmers' Mutual Ins. Co. vs. Crampton, Mich. S. C., 9 Ins. Law Jour., 549.

WHEN NOT COMPETENT OR ADMISSIBLE.

25. Where a party is prevented from cross-examining a witness, through no fault of his own and not through an act of God, the testimony may be excluded, and the rule applies to examinations on commission or conditionally out of court.

Cole vs. The People, 43 N. Y., 508; *Smith vs. Griffith*, 3 Hill, 333; *Forrest vs. Kissam*, 6 Hill, 465.

But where a party does not avail himself of opportunity before trial to cross-examine on facts on which he afterward relies, he may not for the first time object to a deposition at the trial.

Kimball vs. Davis, 19 Wend., 437; S. C. 25 Wend., 259; *Zellinger vs. Coffee*, 5 Duer, 87-100; *Rust vs. Eckler*, 41 N. Y., 483; *Sheldon vs. Wood*, 2 Bosw., 267.

Witnesses may testify concerning memoranda from their recollection refreshed by entries in books in some cases not made by them.

Huff vs. Bennett, 6 N. Y., 337.

It was not competent to show prices at public government sales at a later date and in another city to prove value of purchases, but evidence that government price was not the sole item for reaching the market value at time of purchase, was competent.

Sturm vs. Atlantic Mut. Ins. Co., N. Y. C. A., 63 N. Y., 78; 5 Ins., Law Jour., 209.

26. Objections against evidence as improperly admitted under the averments of the declaration, will not be considered in the ap-

pellate court when not raised in the court below. A refusal to admit evidence showing that agent had exceeded his authority when it did not appear that the liability of the company would be affected thereby, was not error. Where the instruction requested could not have affected the result of the verdict, its refusal was not error.

Hartford Fire Ins. Co. vs. Farrish, Ill. S. C., 5 Ins. Law Jour., 46.

27. The application, which was made a part of the policy, stated that the insured property had not been in litigation while in plaintiff's hands. *Held*, that questions by the company as to when the insured was attached for contempt of court in running the insured distillery, also how many times the distillery had been seized by government, did not tend to prove such litigation and their rejection was not error.

Andes Ins. Co. vs. Shipman, Ill. S. C., 77 Ill., 189; 5 Ins. Law Jour., 137.

28. The secretary was asked whether he had at any time waived such condition in a policy, or whether he had authority to do so. *Held*, that such evidence was not admissible, even as corroborative of his testimony concerning this instance, and to show that he was not mistaken, where he had not been impeached as a witness. Where a witness had testified that he had knowledge of the character of another witness, and had heard his character questioned, the question whether he would believe him on oath was a proper one.

People vs. Davis, 21 W. R., 309.

Adams vs. Greenwich Ins. Co., N. Y. C. A., 70 N. Y. 166; 6 Ins. Law Jour., 705.

29. A note written by plaintiff's attorney before suit, and expressing the opinion that defendant is not liable, is not admissible in evidence for the defense.

Farmers' Mut. F. Ins. Co. vs. Bowen, Mich. S. C., 42 Mich., 147; 8 Ins. Law Jour., 257.

30. When an insurance company, being sued upon a policy, defends upon the ground that the plaintiff fraudulently overvalued

the property destroyed, for the purpose of obtaining the insurance money, and, as a basis of proof, offers in evidence the sworn proofs of loss furnished by plaintiff, that does not make them evidence of the loss in favor of plaintiff. They are only evidence of the fact that they were made and delivered to the company. The principle, that when declarations of a party are introduced in evidence by his adversary, they are to be considered by the jury, as well for the party making as for the party offering them, has no application.

Newmark vs. L. L. & G. Co., 30 Mo., 160, distinguished; *Howard vs. City Fire Ins. Co.*, 4 Denio, 502; *Madison County Bank vs. Gould*, 5 Hill, 309.

Where the ground upon which a case is defended, is fully, fairly and distinctly presented to the jury by several instructions, the fact that another instruction ignores some of the evidence bearing upon the point is not ground for reversing the judgment.

Browne vs. Clay F. & M. Ins. Co., Mo. S. C., 8 *Ins. Law Jour.*, 431.

31. Oral evidence of a mistake cannot be admitted to vary the terms of a written contract in an action based on the policy as written.

Barrett vs. Union Insurance Co., 7 Cush., 175.

McCluskey et al. vs. Providence-Washington Ins. Co., Mass. S. J. C., 126 Mass., 306; 8 *Ins. Law Jour.*, 413.

32. The authority of a supposed agent cannot be proved by his mere declaration. The burden of proof as to agreed time of occupancy, to shorten the life of the policy, is on the company. The custom of adjusting losses cannot affect the rights of the assured, unless he had knowledge of the custom at the time of the issuing of the policy. Testimony of experts as to this custom is therefore inadmissible.

Williams vs. Niagara Ins. Co., Iowa S. C., 50 Iowa, 561; 9 *Ins. Law Jour.*, 38.

33. In an action on a policy of insurance against fire, the issues were whether an addition to the building, in which was the property insured, materially increased the risk, and whether the insurer assented to the addition being made. A witness for the

defendant, who had the general management of its business, was asked on cross-examination whether the plaintiff did not, in an interview with him, show him a letter containing the statement, "All my companies have paid, and I see no reason why the others should not pay." The witness answered in the negative. *Held*, that the evidence was collateral and irrelevant to the issues on trial, that the witness could not be contradicted, and that the admission of a letter written by an agent of other insurance companies, containing such a clause, with evidence that it was shown the witness, gave the defendant good ground of exception.

Kaler vs. Builders' Ins. Co., Mass. S. J. C., 120 Mass., 333.

34. Where the complaint in an action upon a fire insurance policy shows that the policy referred to an application of the assured, and declares it to be thereby "made a part of this policy and a warranty on the part of the assured," proof of the terms of such application, and of the existence of the facts therein stated, or of the performance of promissory undertakings therein contained, is no part of the plaintiff's case; but it is for the defendant to allege and prove the non-existence of such facts or a breach of such promissory warranties.

Redman et al. vs. Etna Ins. Co., Wis. S. C., 49 Wis., 431.

CONSIDERATION OF, BY COURT AND JURY.

35. The conditions of the policy were that a watchman should be kept on the premises day and night, and that in case of loss by fire, the damage should be certified to by a justice of the peace. On the trial in the court below, the plaintiffs did not put in evidence that these conditions had been complied with, and the defendants below, although they denied that they had, did not offer any evidence to prove the facts. The court gave a verdict for the plaintiff below, and it was contended that the plaintiffs below should have proven the fulfillment of the conditions of the policy before a verdict could be rendered in their favor. *Held*, that neither the declaration nor affidavit of claim referred to the application, while the defendants, neither by craving oyer, nor by notice, made it incumbent on the plaintiffs to call for or produce

it. Under the pleadings, the policy was evidence to go to the jury as *prima facie* evidence of the plaintiffs' case.

Franklin Fire Ins. Co. vs. Staib et al., Pa. S. C., 4 Ins. Law Jour., 398.

36. Where the jury has been regularly drawn in all respects, except as to time previous, the court may resort to its own inherent powers and sustain the demurrer to a challenge to the array, where a longer time would have been impossible.

Storrs vs. The People, 2 Soam., 326; Murphy vs. the People, 37 Ill., 447.

Where the evidence on nearly all important points was in direct conflict, presenting a case peculiarly for the jury, their finding will not be disturbed as against the weight of evidence, if it appears to have been fairly considered. Instructions asked for should be stated as briefly as the points involved will allow.

Rockford Ins. Co. vs. Nelson, Ill. S. C., 5 Ins. Law Jour., 387.

37. Great weight must be given to the opinion of the court that hears the testimony, observes the manner in which it is given in, and determines upon it as a whole while the impression is still fresh. When it does not clearly appear that the court erred in deciding the evidence insufficient to prove a contract, an appellate court will not disturb the judgment.

Patterson vs. Ben Franklin Ins. Co., Pa. S. C., 87 Pa., 454; 5 Ins. Law Jour., 123.

38. In suit on a policy of insurance where the defendant pleads *non est factum*, any evidence tending to show the execution of the instrument, even though contradicted, will be sufficient to give the paper to the jury, who are then to determine what weight shall be attached to the testimony. As to the right of the court to pass upon testimony touching the execution of a paper, a distinction may be drawn between a document whose execution is the main issue being tried, and one the execution of which is preliminary or collateral to the main controversy. In the former case it is a mere usurpation of the province of the jury, and a practice totally unauthorized, for the court to withdraw the panel and proceed of its own motion to hear testimony

touching the execution of the instrument. The court intimated without expressing an opinion, that in suit of an insurance policy the defense of *non est factum*, and that the policy was to be issued on property to be occupied as a boarding house," etc. etc., might be inconsistent pleas.

Grady vs. The Am. Cent. Ins. Co. of St. Louis, Mo. S. C., 60 Mo., 116.

39. Barr made a written application on May 3d, 1870, to the Farmers' Mutual Fire Insurance Company for insurance against fire for three years from that date, and a policy was duly made out in accordance therein, bearing date May 3d, 1870. The receipt given to Barr for the amount of the premium was dated May 31st, 1870, and there was evidence tending to show that the insurance was to be for three years from May 31st, 1870. Judgment creditors of Barr issued an attachment in execution, and summoned the insurance company as garnishees. At the trial, evidence was given in behalf of the garnishees, tending to prove that the date of this receipt had been altered from May 3d, 1870, to May 31st, 1870. The court charged that there was no evidence to show such alteration, and took the consideration of that question from the jury. *Held*, to be error.

Fire Ins. Co. vs. Blair, Pa. S. C., 82 Penn. St., 33.

40. Where the charge was refused, that if the jury believed A., they must find for the defendant; *Held*, that a court is not bound to present any such proposition to a jury as will confine them to considering one witness more than another.

Westchester Fire Ins. Co. vs. Earle & Reynolds, Mich. S. C., 33 Mich., 14; 5 Ins. Law Jour., 61.

41. Where the fact depends upon conflicting evidence, or inference to be drawn from facts proved, it is for the jury.

Sherwood vs. Mercantile Mut. Ins. Co., N. Y. C. A., 66 N. Y., 630; 5 Ins. Law Jour., 747.

42. The insured furnished the company proof of loss signed not by himself, as required in the policy, but by his agent. He claimed that the company had not at first objected to the proof,

and had therefore waived the requirement. The evidence was contradictory. *Held*, that in an action involving a conflict of testimony, it is necessary that a jury shall determine the credibility of the witnesses. If the weight of testimony is against the finding of the jury, it is a matter for consideration upon a motion for a new trial, but not an error of law on the part of the court.

Humboldt Fire Ins. Co. vs. Krægher, Pa. S. C., 6 Ins. Law Jour., 147.

43. The jury are the proper judges of the credibility of testimony, but have no right to capriciously reject the testimony of one witness and accept that of another. Where it appeared from the verdict that there had been no weighing of conflicting evidence; *Held*, that the verdict was against the weight of evidence.

St. Paul F. and M. Ins. Co. vs. Johnson, Ill. S. C., 77 Ill., 598; 6 Ins. Law Jour., 434.

44. Instructions which proposed to submit a question of law to the jury, whether there had been such a violation of the conditions of the policy as to work a forfeiture, were properly refused. Whether the facts and circumstances which constitute a forfeiture are proved is a question for the jury; whether, when proved, they constitute a forfeiture, is a matter of law for the court. Where there was conflicting evidence and the judge concurred with the jury in their finding, and the instructions were properly given, a refusal to grant a new trial on the ground that the verdict was against the law and evidence, was not error.

Blosser vs. Harshberger, 21 Gratt., 214.

Georgia Home Ins. Co. vs. Kinnier, Va. S. C. A., 6 Ins. Law Jour., 497.

45. Where an action is tried by the District Court in Minnesota, itself without a jury, a motion in that court for a new trial upon the ground that the evidence does not justify any finding of fact, is not necessary in order to entitle an appellant to raise the question of the sufficiency of the evidence in this court. The statute gives a party the right to make the motion below if he desires to do so, but does not require him to make it as a pre-

requisite to have the sufficiency of the evidence examined in the appellate court.

St. Paul F. & M. Ins. Co. vs. Allis et al., Minn. S. C., 6 Ins. Law Jour., 789.

46. Failure to call a clerk, who was present in court, where suspicious circumstances at the time of the fire are alleged against the principal, may be a proper subject of comment by the court.

Fowler vs. Old North State Ins. Co., N. C. S. C., 74 N. C. 89; 6 Ins. Law Jour., 432.

47. In determining whether the facts have been sufficiently established by the evidence, where the case comes before an appellate court on a demurrer filed by defendant, the rule is, that the demurrant must be considered as admitting all that can reasonably be inferred by a jury from the evidence given by the other party, and as waiving all the evidence on his part which contradicts that offered by the other party, or the credit of which is impeached, and all inferences from his own evidence which do not necessarily flow from it. A recital in the policy that the goods were F.'s, and proofs showing the loss to the plaintiff S. by their destruction, is evidence from which a jury might reasonably infer that the goods belonged to F. when the policy was issued, and that they had been transferred to S. as owner, prior to their destruction.

Muleman vs. National Ins. Co., 5 W. Va. R., 508.

Evidence that adjusters from several companies concerned in the loss, took charge of the adjustment, and evidence of one M., a general agent who procured the policy in question, though not the company's agent, that he learned from their statements and conduct that they were authorized to act for that company, is evidence from which a jury might infer they were authorized to act for the company in question. Where the adjusters, with full knowledge of the facts, took evidence of the losses, delivered a copy of the adjustment in the handwriting of their clerk to a representative of the insured, and agreed to see the company about waiving the sixty days clause in the matter of payment, and nothing further was heard from the company until payment was re-

fused when demanded at the expiration of that time ; *Held*, that this was evidence from which the court on demurrer had a right to infer that an adjustment was made.

Stolle vs. Aetna F. & M. Ins. Co., W. Va. C. A., 10 W. Va., 546 ; 6 Ins. Law Jour., 778.

48. The liability of the company depended on a knowledge of incumbrances by the agent, who testified that he had no such knowledge, while the insured testified that he had, but a letter from the insured to the company, subsequent to the loss, was put in evidence, stating that "I know nothing about whether he knew of the mortgage or not." No attempt was made to explain this letter on the part of the insured. *Held*, that a verdict for the insured was contrary to the evidence, and should be reversed ; the finding should be for the company.

Huntley vs. Home Ins. Co. of Columbus, Iowa S. C., 6 Ins. Law Jour., 134.

49. Instructions confining the attention of the jury entirely to questions on the validity or otherwise of a renewal agreement, are sufficient compliance with a request to charge that a recovery could only be had under a renewal. Where the relations of a witness as a confidential adviser of the plaintiff are in dispute, it is not improper to leave to the jury to exclude his evidence so far as they may find his relations to have been confidential.

1st ed. Ph. Ev., 4 ; 1 Gr. Ev., 334, 425.

Where a conversation was in evidence which, if credited, showed that the insured did not pretend to any rights under the policy, it was error to refuse to charge that if such a conversation was held the insured could not recover.

Hartford F. Ins. Co. vs. Reynolds, Mich. S. C., 36 Mich., 502 ; 7 Ins. Law Jour., 214.

50. In the trial of an insurance case, it is no proper ground of challenge that the jurors had heard part of the evidence in a similar case, between the same plaintiff and another insurance company, unless it can also be shown that the jurors thereby had formed a fixed and not merely hypothetical opinion.

Lycoming Fire Ins. Co. vs. Ward, Ill. S. C., 90 Ill., 545 ; 8 Ins. Law Jour., 603.

51. The credibility of witnesses is for the jury. The court cannot instruct who to believe and who not. They must be judged by their bearing; by the intrinsic probability of their testimony, by its consistency, and by the absence or presence of motives and prejudice.

Huchberger vs. Ins. Co., 4 Bissell.

If a witness has sworn falsely, his testimony may be rejected in whole or in part, at the discretion of the jury. Mere numbers do not, as a rule, create a preponderance of testimony. Insurance companies have rights as sacred as individuals, and the minds of the jury should be purged of all prejudice.

Sibley vs. St. Paul F. & M. Ins. Co., U. S. C. C. Ill., 8 Ins. Law Jour., 461.

52. *Held*, that where there was evidence that an article could not be removed without great damage, and that the insured said, "let it burn," or that it might better burn, and the article was not insured, also that insured made great exertions to save insured property, there was not sufficient evidence to call for a charge concerning incendiarism, and a charge that the evidence must be as conclusive as if on trial for a crime, though erroneous, was not material. *Held*, that where it was doubtful from the record whether the judge had misstated evidence to the jury and no objection was made at the time, error cannot be alleged on review.

Farmers' Mut. F. Ins. Co. vs. Gargett et al., Mich. S. C., 42 Mich., 289; 9 Ins. Law Jour., 108.

See Cross Index for other cases bearing on EVIDENCE.

EXECUTION.

DIGEST OF RECENT CASES.

An insurance company will be charged as trustee in execution process when the debt which it owes the principal defendant is solely for the amount due on a policy of insurance upon house-

hold furniture, although the furniture at the time of its destruction by fire was exempt from attachment.

Wooster vs. Page and Trustee, N. H. S. C., 4 Ins. Law Jour., 483.

See Cross Index for other cases bearing on EXECUTION.

EXECUTORS.

See TRUSTEES AND EXECUTORS.

EXPENSES.

ABSTRACT OF THE LAW.

a. Extraordinary expenses for the common benefit are to be contributed for as general average.

Ross vs. Ship Active, 2 Wash. C. C., 226; *Plummer vs. Wildman*, 3 M. S., 482; *Barker vs. Phoenix Ins. Co.*, 8 Johns., 307; *Orrok vs. Commonwealth Ins. Co.*, 21 Pick., 456.

b. Expenses of crew while ship is seeking a port for necessary repairs or supplies must be contributed for.

Thornton vs. U. S. Ins. Co., 3 Sumner, 400; *Bixby vs. Franklin Ins. Co.*, 3 Sumner, 46.

c. Expenses incurred for the exclusive benefit of a part, can claim only against that part.

Peters vs. Warren Ins. Co., 1 Story, 463.

d. Expenses of delay before the voyage begins, give no claims for contribution.

Ins. Co. of N. A. vs. Jones, 2 Binn., 547; *Penny vs. N. Y. Ins. Co.*, 3 Calnes, 155.

e. Expenses must be successfully incurred as well as intended for the common good to justify a claim for contribution.

Nelson vs. Belmont, 5 Duer, 310; *Williams vs. Suffolk Ins. Co.*, 3 Sumner, 510; *Scudder vs. Bradford*, 14 Pick., 13.

f. Whether the expenses of removal of goods in case of fire, are within a fire policy, the authorities are not agreed; the better rule appears to be that if the danger is sufficient to charge the fire with being the proximate cause of

the expenses, the insurers are liable in the absence of a stipulation to the contrary.

Case vs. Hartford F. Ins. Co., 13 Ill., 676; White vs. Republic F. Ins. Co., 57 Me., 91; Hillier vs. Ins. Co., 3 Penn., 470; Brady vs. Ins. Co., 11 Mich., 425.

See further on this subject under GENERAL AVERAGE, PARTICULAR AVERAGE, REMOVAL OF GOODS.

DIGEST OF RECENT CASES.

EXPENSES.—CASES IN LOWER OR FOREIGN COURTS.

1. Under a policy warranted free from particular average unless stranded, sunk or burned, but containing the usual clause providing that insured might labor, etc., for preservation of cargo without prejudice to the insurance which should contribute to the charges, part of the cargo was fermenting and it was necessary to unship the whole to prevent a total loss. *Held*, that contribution to the expenses was limited to the unshipping and conveying to a warehouse, and of separating and conditioning the unsound part, and did not include the subsequent care of the unsound portion.

Meyer et al. vs. Ralli et al., Eng. C. P., 45 L. J. R. N. S., 741.

2. A quantity of indigo was shipped from Calcutta to London, and the vessel was stranded on the French coast. To save the vessel, the cargo was discharged and forwarded to the owner by various ways, the shipowner thus earning his freight. The shipowner charged against the cargo personal and agency expenses during the operation, and the management while in his custody. *Held*, that the shipowner had a special interest in getting the ship off to earn his freight, and therefore cannot throw any extra expense on the shippers of goods for doing what was essential to his own interests, and in performance of the obligations of his own contract; he was not justified in giving up the adventure until it became hopeless, and it is not hopeless when he can bring both ship and cargo into port with some expense and trouble. Expense incurred with regard to goods unidentified, also is for the shipowner's benefit, as well as that of the consignees. They are entitled to the delivery of their goods upon production of bill

of lading, and an arrangement entered into to distribute the proceeds of the sale, being to enable the owner to claim freight thereon, no extra charge could be made.

Schuster & Co. vs. Fletcher, Eng. Q. B., 7 Ins. Law. Jour., 880.

3. The expense of removal of a vessel wrecked in the approach to a private harbor which, under the English Harbors act, falls on the vessel owner, is not within the risks covered by the ordinary marine policy.

Earl of Eglinton vs. Norman et al., Eng. C. A., 46 L. J. R. N. S., 557.

See Cross Index for other cases bearing on EXPENSES.

EXPERT.

ABSTRACT OF THE LAW.

a. Expert testimony is admissible only as to matters not familiar, or of which the jury may not be competent judges.

Maloy vs. Ins. Co., 2 Gray, 241; Norman vs. Higgins, 107 Mass., 494; Pennsylvania Railroad Co. vs. Hope, 8 Penn. St., 373; Jefferson Ins. Co. vs. Cotheal, 7 Wend. (N. Y.), 72; Connell vs. Phoenix Ins. Co., 59 Me., 582.

b. The opinion of an expert is not admissible evidence unless special skill or science is requisite to reach that opinion; otherwise the question is simply one of fact for the determination of the jury.

Kendall vs. Holland Purchase Ins. Co., 2 N. Y., 375; Van Zandt vs. Ins. Co., 55 N. Y., 169; Rawls vs. Ins. Co., 27 N. Y., 282.

c. Evidence as to valuation, must be based on an expert knowledge of values.

Norman vs. Wells, 17 Wend. (N. Y.), 136; Terpenning vs. Corn Exchange Ins. Co., 43 N. Y., 279.

d. Expert testimony relative to the construction of the policy, must be confined to the construction at the location of the risk.

Germania Ins. Co. vs. Francis, 52 Miss., 457.

e. Evidence as to facts, does not require the knowledge of an expert.

Terpenning vs. Ins. Co., supra; Joyce vs. Maine Ins. Co., 45 Me., 168.

See further on this subject under EVIDENCE.

DIGEST OF RECENT CASES.

EXPERT.

1. A carpenter, who from his experience could tell the cost of constructing the building in Boston and its vicinity, is competent as an expert regarding such cost in another city where the only difference is in the matter of freight.

Tucker vs. Massachusetts Central Railroad, 118 Mass., 546 ; *Lawrence vs. Boston*, 119 Mass., 126.

Hills vs. Home Ins. Co., *Mass. S. J. C.*, 9 *Ins. Law Jour.*, 814.

2. In an action upon a policy of fire insurance which contains a clause providing against any increase of risk. The testimony of experts is competent upon the question as to the materiality of circumstances affecting the risk, especially where its determination calls for a degree of knowledge not likely to be possessed by an ordinary jury ; but expert testimony, although uncontradicted, is not conclusive save in case where none but experts are capable of determining the questions. Where special circumstances are proved, calling upon the jury to determine whether the general principles governing similar cases as testified to by experts, are applicable, in the case before them, it is proper to submit the questions to the jury. A policy of insurance upon a dwelling house contained a condition to the effect that any increase of hazard or material change, without consent, should avoid the policy. At the time the policy was issued the dwelling was occupied by a tenant : it thereafter became vacant, and remained unoccupied about two months. when it was burned. On the trial of an action upon the policy, three persons engaged in the business of insurance, called as witnesses by defendant, testified that unoccupied buildings were more exposed to the hazard of fire than if occupied, and they were classed as more hazardous, as they had not the care which occupied buildings had, and were more exposed to be burned by tramps and children. No testimony directly contradictory was introduced by plaintiff, but he gave evidence showing the location and condition of the premises, and the character

of the neighborhood. *Held*, that the question as to whether there had been a breach of the condition was properly submitted to the jury; that the question as to increase of risk was one of fact, as to which the testimony of experts was competent, but not controlling.

Cornish vs. F. B. F. Ins. Co., N. Y. C. A., 77 N. Y., 275.

See Cross Index for other cases bearing on EXPERTS.

EXPLOSION.

ABSTRACT OF THE LAW.

a. Fire must be the proximate cause of a loss by explosion in order to be within the policy insuring only against fire.

Thornton vs. Royal Ins. Co., 2 H. & N., 235; Babcock vs. Montgomery Ins. Co., 6 Barb., (N. Y.), 637; Waters vs. Louisville Ins. Co., 1 McLean, 275; Citizens' Ins. Co. vs. Glasgow, 9 Mo., 406.

b. Where, however, the effects result from a burning substance in contact with a building, it is immaterial whether the consequences manifest themselves in the form of combustion or explosion, or both combined.

Scripture vs. Lowell Ins. Co., 10 Cush. (Mass.), 356.

c. When the policy exempts from liability for explosion, fire must be the proximate cause, and damage done by explosion alone may be separately estimated, and rejected when possible.

Briggs vs. N. A. Ins. Co., 53 N. Y., 447; Montgomery vs. Firemen's Ins. Co., 16 B. Mon. (Ky.), 427; St. John vs. American Mutual F. and M. Ins. Co., 11 N. Y., 516.

d. Exemptions from liability for explosion will be strictly construed.

Bacon vs. Aetna Ins. Co., 40 Conn., 573.

e. Blowing up of buildings to arrest conflagration, when justified, is a loss by fire and not by explosion.

City F. Ins. Co. vs. Corlies, 21 Wend., 867; Greenwald vs. Ins. Co., 3 Phila., 823.

See further on this subject under BUILDING, LOSS, POLICY.

DIGEST OF RECENT CASES.

EXPLOSION—WHEN WITHIN THE POLICY.

1. If an explosion resulted from fire, the fire is the proximate cause of loss, and the company is not exempt under an explosion clause. But if an explosion resulted from a spark or flame, and

this caused the destruction, and a fire followed, the company is exempt. In the insurance of a specially hazardous risk, like a flour mill, the policy is assumed to be made with reference to the peculiar dangers, such as the accumulation of inflammable flour dust.

Washburne vs. Western Ins. Co., U. S. C. C., Wis.

2. Three policies of insurance against loss or damage by fire, were made upon a stock in trade, described as contained in a certain building. The first policy provided that, if any property insured was "damaged by explosion from any cause, this company is not liable unless fire ensues, and then for the loss or damage by fire only." The second policy provided that the company should in no event be liable "for any damage caused by the explosion of gunpowder on storage, or a steam boiler, except so far as the property, after the explosion, shall be destroyed by fire." The third policy provided that the company shall not be liable "for any loss caused by the explosion of gunpowder or any explosive substance, nor by lightning or explosion of any kind, unless fire ensues, and then for the loss or damage by fire only, which loss shall be determined by the value of the damaged property after the casualty by explosion or lightning," and also provided that, "if a building shall fall, except as the result of fire, all insurance on it or its contents shall immediately cease and determine." By a sudden combustion of inflammable gas an explosion took place in one of the upper stories of the building, blew outward the larger portion of the wall on two sides, and caused the instantaneous fall of the roof, the interior partitions, and the contents of the rooms, including a stove with a coal fire burning therein, in a mass of ruins upon the assured's shop, in the lower story; and immediately after the explosion and fall, a fire, kindled by the burning coals from the stove, broke out in the fallen ruins, and destroyed his stock to the amount insured by all the policies. *Held*, that each insurer was liable for the injury to the plaintiff's goods by the fire which broke out immediately after the destruction of the building.

Dows v. Faneuil Hall Ins. Co., Mass. S. J. C., 127 Mass., 346.

3. The policy contains an exception to the risk as follows: "That this corporation shall not be liable to make good any loss or damage by fire, which may happen, or take place, occasioned by explosions of any kind, or by means of invasion, insurrection, riot or civil commotion, or of any military or usurped power." *Held*, that the company intended not only to guard against all loss or damage by fire occasioned by means of either invasion, insurrection, riot or civil commotion, or of any military or usurped power, but also intended to guard against all loss, or damage, by fire, which may happen or take place occasioned by explosion of any kind. The fire in this case was not occasioned by explosions of any kind. The plaintiff is not bound by the erroneous statement of the cause of the fire, made in the preliminary proofs, but may fix the defendants' liability by proof of the true cause of the loss, without regard to the statement in the preliminary proofs; there being no fraud. The contracting parties did not intend by the special premium to exempt from the printed exception the explosion risk, but did intend the special premium, because of the extra hazard of fire risks, designated in memorandum of special hazard.

Smiley vs. Citizens' F., M. & L. Ins. Co., West Va. S. C., 14 W. Va., 33.

4. The policy of insurance in suit contained the following exceptions: "XI. Not liable for. This company shall not be liable for loss in case of fire happening by any insurrection, invasion, foreign enemy, civil commotion, riot, or any military or usurped power; nor for damage by lightning (unless fire ensues, and then for the loss or damage by fire only, which shall be determined by the value of the damaged property after the casualty by lightning); or explosions of any kind whatever within the premises." The weight of the testimony was that a destructive fire had broken out on the premises insured, and continued to burn for from five to eight minutes when an explosion occurred, almost immediately followed by a second explosion, which caused, with the fire, the total destruction of the premises. Found, by the Circuit Judge (trial by jury being waived), as matter of fact, that a destructive fire preceded the explosions and

caused them; and *Held*, 1st, that the fire being the proximate cause of the loss, the case is not within the exception contained in the policy, that it is immaterial that the destruction of the insured premises attacked by fire was accelerated or rendered more complete by the explosions; and that it is only in a case where an explosion originally produces the loss, or there is mere ignition of explosive matter and a destructive fire ensues, that the exception applies.

Washburn vs. Artizan's Ins. Co., U. S. C. C., W. D. Pa., 9 Ins. Law Jour., 68.

5. The insurance was on a flour mill in which a fire was followed by an explosion of flour dust which destroyed the mill. The policy of the M. company stipulated that it should not be liable for loss by explosion unless fire ensued and then for loss by fire only, and enumerated certain explosive articles whose keeping was prohibited. The policy of the F. company, after prohibiting the keeping of certain explosives, provided that the company should not be liable "for any loss caused by the explosion of gunpowder, or any explosive substance, nor explosion of any kind, unless fire ensues, and then for the loss or damage by fire only." The policy of the U. company provides that it should not be liable "for loss or damage occasioned by the explosion of a steamboiler, gunpowder, or any other explosive substance, except only such loss as shall result from fire that may ensue therefrom; nor shall the company be liable for any loss by such fire, unless privilege shall have been given in the policy to keep such articles." *Held*, that there was nothing in the policies to withdraw their protection in case of fire, although an explosion was an incident of such fire. The companies were protected against fire resulting from an explosion but not against an explosion as the result of a fire. *Held*, that the term explosives does not apply to explosives accidentally present of a known fixed character, and an element of the business like flour dust. *Held*, that the companies were liable for the loss.

Washburn vs. Miami Valley Ins. Co. et al., U. S. C. C. Ohio, 9 Ins. Law Jour., 761.

6. The policy insured the building and machinery of a flouring

mill in Minnesota, which was destroyed through the force of an explosion in connection with fire. It was alleged by the defendant that the explosion resulted from flour dust, fired by a spark or flame from a lamp, and that the fire was caused by the explosion; while the plaintiff insisted that a fire preceded and caused the explosion. The policy contained the following condition: "The company shall not be liable for fire caused by invasion, insurrection, riot, civil commotion, or military or usurped power; nor for loss by lightning unless fire ensue, and then for loss by fire only; nor for loss by fire or otherwise resulting from the explosion of steam boilers, or gunpowder or other explosive substance; nor for loss of any kind consequent upon the fall of a building herein insured, or containing property hereby covered (except the same be a result of fire); and all insurance under this policy on it or its contents shall, in such case, immediately cease and determine." *Held*, that if the explosion was caused by a fire, although the explosion contributed in large degree to the destruction, fire was the proximate cause, and the policy was liable; but if the explosion resulted from a spark or lamp and caused the destruction in whole or in part, and the fire resulted from the explosion, the policy was exempt.

7 Wall., 44; 11 Pet., 213; 94 U. S., 469; 95 U. S., 117.

Held, that any specially inflammable or hazardous condition due to the presence of flour dust, must be presumed to be known to the insurers, if an incident of the business.

Washburn vs. Western Ins. Co., U. S. C. C. Ohio, 9 Ins. Law Jour., 424.

7. An explosion above the store caused upper portion of building to fall on goods insured, producing the fire which caused the loss. *Held*, that insurers were liable for loss by fire which broke out immediately after the fall.

Dows vs. Traders & Mech. Ins. Co. et al., Boston, Mass., Sup. Court.

8. The perils for which the underwriters were liable were "perils of the sea," and "all other perils, losses, and misfortunes." The insurance was on a steam vessel. *Held*, that damages

from an explosion of the boiler were within "all other perils, etc."

West India and Panama Telegraph Co. vs. Home and Colonial Mar. Ins. Co., Eng. C. A.

GENERAL RESPONSIBILITY FOR.

9. Parties storing inflammable and explosive materials in such manner as that they are naturally liable to explode and burn and destroy adjacent property, are liable for the consequences.

Wright vs. Chicago & N. W. R. R., Chicago, Ill., App. Court.

See Cross Index for other cases bearing on EXPLOSION.

FACTOR.

See CONSIGNEE.

See Cross Index at end of volume, for cases bearing on FACTOR.

FACTORY.

ABSTRACT OF THE LAW.

a. The term factory includes whatever by the fair intendment of the parties can be legitimately embraced within the description, and is essential to its completeness. It may consist of buildings wholly or partly detached if in the same inclosure, and such machinery or appurtenances as are necessary to give it completeness as a factory. The same is true of the term mill, or any other involving the idea of a collective rather than an individual or specific hazard.

Washington Ins. Co. vs. Davison et al., 30 Md., 91; Liebenstein vs. Ins. Co., 45 Ill., 301; Blake vs. Exchange Mut. Ins. Co., 12 Gray (Mass.), 265; Bigler vs. N. Y. Cent. Ins. Co., 20 Barb. (N. Y.), 635; Workman vs. Ins. Co., 2 La., 507.

b. But the designation of a specific building will exclude others, though belonging naturally to the factory.

Moadinger vs. Mech. F. Ins. Co., 2 Hall (N. Y.), 490; *Liddle vs. Market F. Ins. Co.*, 4 Bosw. (N. Y.), 179; *Liebenstein vs. Etna Ins. Co.*, 45 Ill., 801; *N. A. Ins. Co. vs. Throop*, 22 Mich., 146.

See further on this subject under BUILDING, DESCRIPTION, POLICY, RISK.

See Cross Index for cases bearing on FACTORY.

FALL OF BUILDING.

See BUILDING.

See Cross Index at end of volume, for cases bearing on FALL OF BUILDING.

FIXTURES.

ABSTRACT OF THE LAW.

a. Fixtures, within the policy, are generally such chattels as are the personal property of the tenant, or such as are fixed to the premises for the uses of trade, and are removable without material injury to the building.

Whitmarsh vs. Conway Ins. Co., 16 Gray, (Mass.), 369; *Gale vs. Ward*, 13 Mass., 352; *Walker vs. Sherman*, 30 Wend., 636.

b. Fixtures that are so attached to the realty as to constitute an integral part thereof, are not usually within the meaning of the term as used in the policy; and such fixtures are generally covered by a policy on the building.

Swift vs. Thompson, *supra*; *White vs. Mutual F. Ins. Co.*, 8 Gray (Mass.), 566.

c. Furniture is not a fixture.

Holmes vs. Charlestown Mut. Ins. Co., 10 Met. (Mass.), 211.

See further on this subject under BUILDING, POLICY.

DIGEST OF RECENT CASES.

FIXTURES—WHAT ARE AND WHAT ARE NOT.

1. Mirrors not set in the wall but simply supported by hooks, and gas fixtures screwed on to the projecting ends of the pipes are not part of the realty, which go with the building, but

mere chattels, and a mere oral declaration of the owner that they are to go with the building does not make them part of the realty.

Winslow vs. Merchants' Ins. Co., 4 Metc., 311; Vaughan vs. Holdeman, 33 Penn., 423; Rogers vs. Crow, 40 Misso., 91; Montague vs. Pent, 10 Rich. L. R., 135, (S. Car.); Shaw vs. Lenke, 1 Daly, 487; Lawrence vs. Kemp, 1 Duer, 363; Beck vs. Re Bow, 1 P. Wms., 94.

The house containing them was subsequently sold to N., and the mirrors and fixtures specially bargained for and purchased, but no mention was made of them in the deed nor any bill of sale given. N. mortgaged the house to defendants, but no mention was made of the mirrors and fixtures in the mortgage, though N. represented that they were to go with the house. N. afterwards conveyed to S., and S. to W., no reference being made to the mirrors and fixtures in the deeds. W. afterwards executed a bill of sale for the chattels to M. The defendants on foreclosure claimed them as part of the mortgaged property. *Held*, that they were not subject to the mortgage, and that though an equity might exist as between the original mortgagor and defendant, this did not extend to subsequent purchasers without notice; these acquired title by delivery and possession. *Held*, that in the absence of any claim by mortgagee at the foreclosure sale, the failure of the owner to give notice of his claim did not work an estoppel. *Held*, that a recovery by assignee of original plaintiff after action began, would sufficiently protect defendant from further claim by the assignor so long as the consideration for the assignment was valid between the parties.

McKeage vs. Hanover F. Ins. Co., N. Y. C. A., 9 Ins. Law Jour., 588.

2. Movable settees in a Sunday-school room are not fixtures which go with the realty. The fact that furniture is indispensable to the proper use of the building does not make it a fixture. But an organ adapted to a recess whose removal would destroy the completeness, though only fastened by two nails, was a fixture.

Chapman vs. Union Mut. Life Ins. Co., Chicago, Ill., App. Court.

See Cross Index for other cases bearing on FIXTURES.

FLOATING POLICY.

ABSTRACT OF THE LAW.

a. Where it is apparent from the language of the contract or the nature of the risk, that the intention of the parties was to have the policy apply to such subject matter as might be within the description at the time of loss, it will be applied accordingly, irrespective of whether such subject matter existed at the time of contracting, and such contracts will be construed in accordance with the usages of trade. Property such as merchandise, whose amount or character is constantly changing, is usually of this kind.

Nicolet vs. Ins. Co., 3 La., 371; *Peoria etc. Ins. Co. vs. Anapaw*, 51 Ill., 283; *Wood vs. Rutland etc. Ins. Co.*, 31 Vt., 532; *Whitwell vs. Ins. Co.*, 6 Lans. (N. Y.), 166; *Lane vs. Ins. Co.*, 12 Me., 44; *Eastern R. R. Co. vs. Relief F. Ins. Co.*, 93 Mass., 420; *Moadinger vs. Ins. Co.*, 2 Hall (N. Y.), 490; *Crosby vs. Ins. Co.*, 5 Gray (Mass.), 504.

b. But if the contract is specifically limited to certain designated subjects, usages of trade or the general character of the risk will not justify its extension to subjects not within the apparent intention of the parties, nor will it be extended to subjects not within the place designated.

Burgoss vs. Alliance Ins. Co., 10 Allen (Mass.), 221; *Liddle vs. Market F. Ins. Co.*, 4 Bosw. (N. Y.), 179; *Storer vs. Elliot Ins. Co.*, 45 Me., 175; *Rafael vs. Ins. Co.*, 7 La. An., 244; *Huckins vs. Ins. Co.*, 11 Fost. (N. H.), 238.

c. Where the amount of insurance is not apportioned between the subjects in the policy, the latter to its full amount will float with the loss.

Blake vs. Exchange Mut. Ins. Co., 12 Gray (Mass.), 265; *Nicolet vs. Ins. Co.*, *supra*; *Rex vs. Ins. Co.*, 20 N. H., 198.

See further on this subject under POLICY, RISK.

See Cross Index for cases bearing on FLOATING POLICY.

FORFEITURE.

ABSTRACT OF THE LAW.

a. Any conduct on the part of the insurer or its authorized representative, calculated to induce a belief in the mind of the insured that the strict terms of the contract will not be insisted on, may be a waiver of forfeiture.

Troy F. Ins. Co. vs. Carpenter, 4 Wis., 20; *Teutonia Ins. Co. vs. Anderson*, 77 Ill., 382; *Keenan vs. Dubuque Ins. Co.*, 13 Iowa, 375; *Shearman vs. Niagara F. Ins. Co.*, 46 N. Y., 526.

See further on this subject under AGENT, CONCEALMENT, FRAUD, INCUMBRANCE, PREMIUM, PREMIUM NOTE, PROOFS OF LOSS, REPRESENTATION, TITLE, VALUATION, WARRANTY.

DIGEST OF RECENT CASES.

FORFEITURE.

1. Provisions involving forfeitures must be construed strictly. There is great hardship in allowing parties to keep money they have not fairly earned, and great wrong in favoring blind conditions, or those which parties do not fully understand, when they are not in actual fault.

Westchester Fire Ins. Co. vs. Earle & Reynolds, Mich. S. C., 33 Mich. 14; 5 Ins. Law Jour., 61.

See Cross Index for other cases bearing on FORFEITURE.

FOREIGN COMPANIES.

See STATUTE, UNAUTHORIZED COMPANIES.

See Cross Index at end of volume, for cases bearing on FOREIGN COMPANIES.

FRAUD.

ABSTRACT OF THE LAW.

a. The essence of fraud lies in the intention, and a mere misstatement, however erroneous, will not of itself constitute fraud, though it may be regarded as evidence tending to prove it.

Parker vs. Amazon Ins. Co., 34 Wis., 363; Clark vs. Phoenix Ins. Co., 36 Cal., 168; Jones vs. Mechanics F. Ins. Co., 36 N. J., 29.

b. Fraud or attempted fraud on the part of the insured invalidates the contract; the question is one of fact for the jury.

Marion vs. Republic Ins. Co., 35 Mo., 148; Gieb vs. International Ins. Co., 1 Del. 443; Wolf vs. Goodhue Ins. Co., 43 Barb. (N. Y.), 400.

See further on this subject under CONCEALMENT, REPRESENTATION, RISK, VALUATION.

DIGEST OF RECENT CASES.

FRAUD—WHEN IT CONSTITUTES A VALID DEFENSE.

1. The property was insured for \$600, and the insured, for the apparent purpose of inducing a speedy settlement, and preventing controversy regarding to his being entitled to the full amount of insurance, made oath, in his proofs of loss, that the value of the property was \$1,000, whereas it was materially less, though over \$600. *Held*, that this was attempted fraud, which vitiated the policy under a condition providing that fraud or attempted fraud on the part of the insured should work a forfeiture.

Sleeper vs. New Hampshire Fire Ins. Co., N. H. S. C., 50 N. H., 239; 5 Law Ins. Jour., 537.

2. The policy insured \$2,000 on building, \$1,000 on fixtures, and \$2,000 on stock, and contained a provision that "all fraud, or attempt at fraud, or false swearing on the part of the assured, or on the part of any person in his behalf, shall cause a forfeiture of all claim under the policy." Fraud was proved in the claim on stock, but not as to the building or fixtures. *Held*, that the case is not one where the policy, because several in substance, may be avoided only in part. It was the intention of the parties that fraud should avoid the whole policy. The maxim *falsum in uno falsum in omnibus* applies; the insured having been convicted of falsehood regarding one of the subjects of insurance, will be considered false in regard to all the rest. *Held*, that the policy would be avoided by fraud on the part of the insured in making the contract without any provision to that effect, and instruction extending the penalty of forfeiture to such fraud was not error.

Ferris & Eaton vs. North American Fire Ins. Co., 1 Hill, 71, and Ins. Co. vs. Weides, 14 Wall., 375, distinguished.

Moore vs. Va. F. & M. Ins. Co., Va. S. C. A., 6 Ins. Law Jour., 441.

3. Where the sworn statement claimed a loss of \$5,250, and the defense was fraud, and the jury found a verdict of \$2,375,

the discrepancy is sufficient to justify a setting aside, as a virtual finding of fraud on the part of insured.

Fitzgerald vs. Union Ins. Co., Cal. S. C., 54 Cal. R., 599.

WHEN IT DOES NOT CONSTITUTE A VALID DEFENSE.

4. Fraudulent representations do not vitiate a subscription for stock, unless they would have induced a reasonably cautious man to invest, and the contract must be promptly repudiated upon the discovery of the fraud.

Upton vs. Englehart, U. S. C. C. Iowa, 3 Ins. Law Jour., 43.

5. The difference between the amount sworn to by the assured and the value proved on the trial is not necessarily evidence of false swearing on his part.

Israel vs. Teutonia Ins. Co., La. S. C., 28 La., 689.

6. Parties induced to purchase stock through fraud or misrepresentation, may repudiate their stock and be relieved of liability provided they use due diligence and act promptly, but will be estopped from setting up fraud or misrepresentation as against creditors after continued participation in the business of the company, or acquiescence in their position as stockholders.

Upton vs. Jackson, U. S. C. C., 4 Ins. Law Jour., 189.

7. A mere willfully false statement will not work a forfeiture of a policy of insurance, under a condition that "all fraud, or attempt at fraud, by false swearing or otherwise," should cause such a forfeiture, when such false statement could not deceive the insurance company to its injury. The omission to charge that the proofs of loss were not evidence of value, although requested by the defendant, did not constitute an error under the circumstances.

Shaw vs. Scottish Commercial Ins. Co., U. S. C. C. Me.

LEGAL PRINCIPLES APPLICABLE TO.

8. A defense of fraudulent misrepresentation can be maintained without a tender back of premiums.

Blaeser vs. Milwaukee M. and M. Ins. Co., Wis. S. C., 37 Wis., 31.

9. In a suit to recover back the amount fraudulently paid to the insured in Iowa; *Held*, that it was within the discretion of the court whether after the commencement of the trial it would allow the filing of an amended answer pleading the statute of limitations. *Held*, that the Iowa law of 1870, sec. 2530, applies only to frauds solely cognizable in a court of chancery.

Relf vs. Eberly, 23 Iowa, 467; *Gebhard vs. Sattler*, 40 Iowa, 153; *Brown vs. Brown*, 44 Iowa.

Phoenix Ins. Co. vs. Dankwardt et al., Iowa S. C., 7 Ins. Law Jour., 876.

10. The false swearing which will forfeit a claim on an insurance policy must be either in the submission of preliminary proofs of loss, in the examination to which, according to the terms of the policy, the assured may be subjected. If there be a difference claimed under a policy of insurance and that sworn to by the assured himself on the trial, or established by the uncontradicted evidence on the cause, it is a question for the jury, whether under all circumstances the discrepancy is the result of accident, or mistake, or fraudulent intent, of the assured. To forfeit the rights, the swearing must be not only false but fraudulent; and the discrepancy, although unexplained, will not raise the presumption that the latter is the case. And an instruction, that if the jury found a difference between the amount of loss sworn to in plaintiff's proofs and the amount of loss proven on trial, in the absence of explanatory evidence, they should find for defendant, was held bad for the above reasons, and also because the court could not declare what amount had been proved at the trial, and because such instruction might warrant the jury in finding for defendant, if they ascertained the loss proven, in fact less than that claimed in proof of loss.

Schulter vs. Merchants' Mut. Ins. Co., Mo. S. C., 62 Mo., 236.

11. *Question of Fact*.—In a suit to recover additional claims on the ground that a settlement and release was obtained through false and fraudulent representations of an agent; *Held*, that the question was purely a matter of fact for the jury, and instruc-

tions which assumed such representations to be false and fraudulent, were misleading and called for a reversal.

American Ins. Co. vs. Crawford, Ill. S. C., 89 Ill., 62; 7 Ins. Law Jour., 918.

12. Suit was brought by the company to recover back money paid for a loss, on the ground of arson, and a fraudulent inventory of the property alleged to have been destroyed. *Held*, that a previous return or tender by the company of the receipt and voucher given by the insured was not necessary before bringing suit. The policy provided that any fraud, or attempt at fraud, should render it void. To several specific questions directed to the charge of arson, the jury replied that they did not know. *Held*, that the failure to find either affirmatively or negatively regarding the charge of arson did not affect their conclusion as to the charge of fraud.

Johnson vs. Continental Ins. Co., Mich. S. C., 39 Mich., 33; 8 Ins. Law Jour., 362.

13. When the policies were set aside on the ground that they were procured through fraud; *Held*, that the premiums need not be returned.

Rivaz vs. Gerussi & Co., Eng. C. A., 1880.

See Cross Index for further cases bearing on FRAUD.

FREIGHT.

ABSTRACT OF THE LAW.

a. An insurable interest in freight requires the insured to have also an interest in the ownership of the vessel and inchoate right to the freight.

Camden vs. Anderson, 5 T. Rep. 709.

b. Loss of ship and cargo involves a loss of freight only so far as such freight cannot be earned; if the goods could be transhipped and the freight thus earned there is no total loss.

Bradhurst vs. Ins. Co., 9 Johns., 17; Hugg vs. Ins. Co., 7 How., 595.

c. Failure to transship when possible, will exempt the insurers to the same extent as if such transshipment had been made.

Bradhurst vs. Ins. Co., supra; Hogg vs. Ins. Co., supra.

d. Constructive total loss may be claimed on freight in case of loss of 50 per cent; and sometimes in the case of the loss of vessel.

Ogden vs. General Mutual Ins. Co., 2 Duer, 204; *American Ins. Co. vs. Center*, 5 Wend., 45

e. An open policy on the ship does not include freight, but insurance on freight usually attaches to such as may exist at different periods.

1 *Parsons on Marine Insurance*, 526.

f. An assignee of freight may insure.

Paradise vs. Sun Mutual Ins. Co., 6 La. An., 596.

g. In the absence of usage, or of actual or constructive knowledge of the insurer, insurance on freight will not cover goods stored on deck.

Taunton Copper Co. vs. Merchants' Ins. Co., 22 Pick., 108; *Smith vs. Miss. Ins. Co.*, 11 La., 149.

See further on this subject under ABANDONMENT, GENERAL AVERAGE, Loss.

DIGEST OF RECENT CASES.

FREIGHT—WHEN THE INSURERS ARE LIABLE.

1. The ship was chartered from Greenock to Bombay to carry cargo of coals. Freight to be paid on delivery, on quantity delivered. It was provided that "such freight is to be paid, say one-half in cash on signing bills of lading, less four months interest at bank rate, but not less than 5 per cent per annum; 5 per cent for insurance, and 2½ per cent on gross amount of freight in lieu of consignment to Bombay, and the remainder on right delivery of cargo, less cost of coals short delivery." The ship was lost on the way but one-half the cargo was saved and delivered. The ship owner effected two insurances, one for £500 on freight valued at £2,000, the other for £700 on freight payable abroad valued at £2,000. Half the estimated amount of freight was paid in London. The master thinking the prepayment had satisfied the freight on the part delivered, made no claim on the charterer. In an action on the policies for total loss of half the freight; *Held*, that the prepayment was not of one-half as distributed over the whole cargo, but of half the whole gross freight; that half of the whole sum agreed on remained to be paid abroad, on which a total loss might be recovered.

Alison vs. Bristol Mar. Ins. Co., *Eng. House of Lords L. P. Ap. Cas.*, Vol. 1, 209.

2. Plaintiffs, ship owners, entered into a charter party providing for payment of freight at a specific rate, and that: "If any portion of the cargo be delivered sea-damaged, the freight on such sea damaged portion to be two-thirds of the above rate." They effected an insurance, "To cover only one-third of the freight in consequence of sea-damage as per charter party." Sea-damage happened, and one-third of the freight on the sea-damaged portion of the cargo was deducted by the charterers from the whole amount of freight. *Held*, that the subject matter of insurance was the "one-third loss of freight in consequence of sea-damage," and plaintiffs were entitled to recover from each underwriter such proportion of the amount of loss as his subscription bore to the total subscribed.

Griffiths vs. Bramley-Moore, Eng. Q. B., 4 Eng. Q. B. D. C. A., 70.

3. The insurance was on freight list. The cargo of grain was damaged by perils of the sea. The master was alleged to have entered into an agreement with the agent of some of insurers which had also a risk on the cargo, that he would waive all his claims for freight on condition of the reception of the damaged cargo at an intermediate port. *Held*, that there had been no earnings and nothing to be waived, as the damaged grain could not have been carried to its destination, hence there was no consideration for the waiver of freight on the undamaged portion which was earned.

Walper vs. Manhattan Ins. Co., U. S. D. C., N. D. Ill.

WHEN THE INSURERS ARE NOT LIABLE.

4. The action was on a policy for insurance of freight to be carried on a charter-party of a steamer for a voyage from New York to Odessa, the freight agreed upon being a lump sum of £5,500 to be paid at Hull on the proper discharge of the cargo as Odessa. If the vessel had not arrived at the port of New York on or before the 1st of September, 1879, the charterer was to have the option to cancel the charter. The policy was effected in August, 1879, on chartered freight, on the ordinary sea risks,

and also, as expressly stipulated, “including all risks incident to steam navigation.” The clause giving the charterer the option to cancel the charter was not mentioned to the underwriter, nor did he know of it when he signed the insurance. The vessel sailed early in August, and if all had gone well it would in a few days have arrived at New York, so as to preclude the option to cancel; but the engines broke down from some defect in the machinery while the vessel was in the British Channel and had to put back for repairs, which took so long that it was impossible to arrive at New York until long after the 8th of September, so that the charterer exercised his option to cancel the charter, and thus the freight was lost. *Held*, that the loss of freight was not due to the perils insured against, but to the action of the charterer, and the accident, though the occasion, was not the real cause of the loss.

Mercantile Ins. Co. vs. Tyser, Eng. Q. B.

See Cross Index for other cases bearing on FREIGHT.

FURNITURE.

See GOODS AND MERCHANDISE.

See Cross Index for cases bearing on FURNITURE.

GARNISHMENT.

ABSTRACT OF THE LAW.

a. If the debt be due, the insurance company is liable to garnishment though the amount is unsettled.

Boyle vs. Franklin Ins. Co., 7 W. & S., 76; *Girard Ins. Co. vs. Field*, 45 Penn. St., 129; *Swainscott Machine Co. vs. Partridge*, 25 N. H., 369.

b. But where there is nothing absolutely due, or the insured has the option

of replacement and no election has been made, insurers are not liable to garnishee process.

Geis vs. Bechtner, 12 Minn., 279; *Martz vs. Detroit F. & M. Ins. Co.*, 28 Mich., 201; *Pettin-gill vs. Hinks*, 9 Gray (Mass.), 169.

c. The garnishee is entitled to the fullest protection in all his rights, and is not to be made liable to the risk of a double payment nor unnecessary litigation.

Walters vs. Washington Ins. Co., 1 Cole, 404; *Burns vs. Collins*, 64 Me., 215.

DIGEST OF RECENT CASES.

GARNISHMENT.

1. A public officer having control of the funds of an insurance company, cannot be garnisheed by a foreign creditor.

Rollo, Assignee, vs. Andes Ins. Co., Va. S. C. A., 3 *Ins. Law Jour.*, 769.

2. The garnishee cannot bind the principal defendant by an independent and spontaneous submission. Where the garnishee is a foreign corporation, and the service is therefore vicarious, the application of process against some one competent to receive service cannot be waived by the intended garnishee as against the principal defendant. This method of obtaining jurisdiction over a foreign corporation must be confined to the cases and exercised in the way precisely indicated by statute.

Hartford Fire Ins. Co. vs. Owen, 30 Mich., 441.

Hebel vs. Amazon Ins. Co., Mich. S. C., 5 *Ins. Law Jour.*, 599.

3. Where, under the statute of Michigan, a foreign company was summoned to appear as garnishee, and the summons was served on the general agent in the State authorized to receive process, it is not competent for the garnishor to allege that he was not the proper officer to appear and answer. If he was the proper officer to be summoned he was the proper officer to answer. Where such answer, duly made, failed to disclose any liability of the company to the principal defendant, he cannot recover.

Lorman vs. Phoenix Ins. Co., Mich. S. C., 5 *Ins. Law Jour.*, 65.

4. Service of an attachment in execution upon a corporation, as garnishee, when made upon an agent of the corporation, must

be made at the usual place of business or residence of such agent, under the Pennsylvania act of May 4th, 1852. Mere personal service on the agent is not sufficient. The return of the officer must show on its face a legal service.

Winrow vs. Raymond, 4 Barr., 501 ; Wilson vs. Hayes, 6 Harris, 354 ; Weaver vs. Springer, 2 Miles, 42.

Lehigh Valley Ins. Co. vs. Fuller, Pa. S. C., 6 Ins. Law Jour., 486.

See Cross Index at end of volume, for other cases bearing on GARNISHMENT.

GASOLINE.

See KEEPING AND STORING, PROHIBITED RISKS, RISK.

See Cross Index at end of volume, for cases bearing on GASOLINE.

GENERAL AVERAGE.

ABSTRACT OF THE LAW.

a. General average is a contribution made by all parties concerned, towards the loss sustained by a part for the common benefit.

Kent Com., 5th Ed., 232; Ross vs. Ship Active, 2 Wash. C. C., 226.

b. General average is incurred where the loss arises in an emergency not due to misconduct or unskillfulness, and not resulting from the ordinary circumstances of the voyage. Whatever is deliberately and voluntarily done in distress for the preservation of the whole, may be brought into general average and must be made good by the insurers in such proportions as they have underwritten.

Ross vs. Ship Active, *supra*; Ins. Co. vs. Bland, 9 Dana, 147; Strong vs. Ins. Co., 11 Johns., 333.

c. The sacrifice must be voluntary and intended for the common benefit, if unavoidable there is no claim to contribution.

Scudder vs. Bradford, 14 Pick., 13; Butler vs. Wildman, 3 B. & Ald., 402.

d. The loss must not be chargeable to a fault of the owner.

Smith vs. Wright, 1 Caines, 43; Walcott vs. Ins. Co., 4 Pick., 429.

e. Jettison of deck load cannot usually be claimed for under general average, unless its carriage be justified by usage.

Lenox vs. United Ins. Co., 3 Johns., 178; *Cram vs. Aiken*, 18 Me., 229; *Gould vs. Olive*, 4 Bing. N. C., 134.

f. Loss due wholly to a peril of the sea, usually establishes no claim for contribution.

Carlington vs. Roberts, 2 P. & B., N. R., 378; *Power vs. Whitmore*, 4 M. & S., 141.

g. Liability for general average losses extends to consequential damages caused directly by the voluntary act and by that alone.

2 Parsons on Marine Ins., 232, and cases cited.

h. Whether voluntary stranding is a subject of general average contribution, the authorities are at variance.

Bradhurst vs. Ins. Co., 1 Johns., 9; *Columbian Ins. Co. vs. Ashby*, 13 Pet., 331; *Case vs. Rielly*, 3 Wash. C. C., 298.

i. Necessary sale by the master may sometimes justify general average contribution.

Dobson vs. Wilson, 8 Campb., 48; *Schooner Leonidas, Olc. Adm.*, 12.

j. Expenses incurred for the common benefit are proper subjects for average, but not expenses absolutely necessary for the ship itself.

Hassam vs. St. Louis Ins. Co., 7 La. Ann., 11; *Brooks vs. Oriental Ins. Co.*, 7 Pick., 259; *Barker vs. Phoenix Ins. Co.*, 8 Johns., 307.

k. In order to sustain a general average contribution, however, the sacrifice must have been successful; if no benefit has been derived by other interests thereby, there is no liability to contribution.

Williams vs. Suffolk Ins. Co., 5 Sum., 510; *Lee vs. Grinnell*, 5 Duer, 400; *Scudder vs. Bradford*, 14 Pick., 13.

l. A voluntary sacrifice which only hastens a loss that was inevitable, is usually not a subject of contribution.

Marshall vs. Garner, 6 Barb., 394; *Lee vs. Grinnell*, *supra*.

m. As a rule, total loss of the ship is a subject of contribution only in the case of voluntary stranding, but partial injuries are frequently subjects for contribution.

Bradhurst vs. Col. Ins. Co., 9 Johns., 9; *Walker vs. Ins. Co.*, 11 S. R., 61.

n. All interests are liable to contribute, those of the ship, cargo, profits, or freight, where any has been sacrificed for the benefit of the rest.

3 Kent (Com.), 242.

See further on this subject under ABANDONMENT, CONTRIBUTION, LOSS, PARTICULAR AVERAGE.

DIGEST OF RECENT CASES.

GENERAL AVERAGE—WHEN CONTRIBUTION IS TO BE MADE.

1. Voluntary sacrifice of part of ship or cargo for the common benefit of both, when necessary in consequence of a common peril, is a proper subject of general average. No contribution

can be claimed from property not in peril, or that has not been saved from the peril, nor are ordinary losses and expenses proper subjects. The greater the peril, the more meritorious the claim, if the sacrifice was voluntary and for the common good. Where the vessel was damaged seriously by collision, and reached an intermediate port in distress and unable to prosecute her voyage, and services of the seamen were necessary during her repairs for her safety and the prosecution of her voyage, and an agent was sent by the owner to look after her safety; *Held*, that the expenses of the seamen and agent were proper subjects of general average.

Hobson vs. Lord, U. S. S. C.

2. A portion of the cargo was transported and delivered at its destination. The expense of transporting exceeded the entire freight. Freight however was collected or earned on the portion so delivered, and an average bond taken from the owners of the cargo, on which payments were made or became due for the expenses of delivery. *Held*, that where no freight *pro rata* has been earned, or the expense of sending on the cargo by another vessel equals or exceeds the freight agreed upon, there is an absolute total loss of freight, and no abandonment is necessary.

Am. Ins. Co. vs. Center, 4 Wend., 45, 53, citing *Saltus vs. Ocean Ins. Co.*, 12 J. R., 107; *Mount vs. Harrison*, 4 Bing., 388.

Held, that those interested in the cargo were liable to contribute in equable proportions to those expenses, and when the cargo is sent on for the benefit of salvage on the freight, the underwriters thereon are bound to pay the expenses of transshipment.

Huyliker vs. N. Y. Firemen's Ins. Co., 11 J. R., 85; 4 Wend., *supra*.

Robertson vs. Atlantic Mut. Ins. Co., N. Y. C. A. 68 N. Y., 192; 6 *Ins. Law Jour.*, 130.

3. The question was, whether in a risk on a grain cargo specified to be free from particular average above ten per cent, the expenses occasioned by the peril and sale of damaged grain at an intermediate port should be estimated in determining whether the damage had exceeded ten per cent. *Held*, that whatever may be the proper rule of calculating a partial loss, in this case,

under a valued policy, the damage to the shipment of barley by the partial loss on the part sold is less than the ten per cent excepted in the policy. The proceeds to be received by the owners reduce the loss below the average. The result is that the defendants are liable for the general average charge at place of sale, but are not liable for the particular average or partial loss sustained by the plaintiffs.

Becker & Co. vs. General Ins. Co., of Dresden, Court of Arbitration, New York, 4 Ins. Law Jour., 159.

4. Where the vessel was compelled to put into an intermediate port to repair damages resulting from stress of weather; *Held*, that the owner of goods was liable to contribute in general average for incidental expenses, such as port charges, cost of loading and unloading, etc., as well as for the direct damages to the vessel. Usage of average staters in this regard, however well established, could not prevail against the law.

Attwood vs. Sellar, Eng. Q. B., 48 L. J. R. N. S., 465.

WHEN CONTRIBUTION IS NOT TO BE MADE.

5. The vessel was insured under a fire policy against damage by fire only. In order to extinguish a fire while in port, it was submerged, and suit was brought to recover general average charges against the vessel for the expense of submerging and pumping out the vessel, discharging, storing and reloading the cargo, and damage to the cargo. *Held*, that a fire policy is not liable for general average expenses; the contract limits the liability to losses resulting directly from fire to the thing insured, but does not embrace damages to property not insured, though resulting directly from the fire, and charged against the insured under principles of general average.

Citing *Fire Ins. Co. vs. Corlies*, 21 Wendall, 367; *Wetherell vs. Marine Ins. Co.*, 49 Me., 200; *Gusick vs. Crescent &c. Ins. Co.*, 19 La., 297; *Hillier vs. Alleghany Ins. Co.*, 3 Penn. St., 470; *Thompson vs. Montreal Ins. Co.*, 6 U. C., 2 B., 319; *Burkley vs. Pergrave*, 1 East, 228; *Hallett vs. Ingram*, 9 C. B., 580; *Fletcher vs. Alexander*, 37 L. P. (C. P.), 196, L. R., 3 C. P., 380.

Merch. and Miners' Transport Co., vs. Assd. Firemen's Ins. Co., Md. C. A., 53 Md., 448; 9 Ins. Law Jour., 461.

6. A custom must be clearly established and shown to be general in order to prevail over the common law or law merchant principles regarding the liability to contribution for jettison of deck cargo.

Wood & Co. vs. Phoenix Ins. Co., U. S. D. C. E., D. Pa., 9 Ins. Law Jour., 795.

7. The owner of a cargo is entitled in time of peril, to the use of all the appliances on board the ship which are adapted for the purpose of saving it; and if the ship is fitted with a separate engine for pumping, the owner of the ship must, before sailing, provide a reasonable supply of fuel for working such engine. Accordingly, if in time of peril it becomes necessary to burn part of the ship's furniture as fuel for the pumping engine, the owner of the ship is not entitled to general average against the owners of the cargo, unless at the commencement of the voyage there was on board the ship a reasonable supply of fuel for the pumping engine.

Robertson vs. Prince et al., Eng. Q. B., 7 Ins. Law Jour., 800.

8. The mast was cut away during a gale. It was found by the jury to have been hopelessly gone already, and that the only question was as to how it should be sacrificed. *Held*, that if anything on board a ship, which is cut or cast away because it is endangering the whole adventure, is in such a state that it must itself certainly be lost, although the rest of the adventure should be saved without the cutting or casting away, then the destruction of the thing gives no claim for general average.

Shepherd et al. vs. Kollgen et al., Eng. C. A.

PRINCIPLES OF CONTRIBUTION.

9. The policy insured \$3,000 on freight valued at \$15,000. In the adjustment of the general average, the freight was found to be worth \$20,564. The policy provided: "In case of general average, this company is not liable to contribute on a sum greater than the amount herein insured." *Held*, that in case of general average, the contribution was to be made by the respective in-

terests at their true value, but that the policy was only to contribute in the proportion that the freight, as valued, bore to the true value; the owner must be regarded as his own insurer of the excess of value, and contribute in that proportion.

Clark vs. United F. & M. Ins. Co., 7 Mass., 365.

Brewer et al. vs. American Ins. Co., Mass. S. J. C., 123 Mass., 78; 6 Ins. Law Jour., 703.

See Cross Index for other cases bearing on GENERAL AVERAGE.

GOODS AND MERCHANDISE.

ABSTRACT OF THE LAW.

a. The terms goods and merchandise are usually limited to articles within the description which are kept for sale only, and not for use; they apply however to all such articles as are kept for sale irrespective of their character, which are in the place designated by the policy, and they apply to such articles as are on hand at the time of loss, irrespective of their existence or possession at the inception of the contract.

Boynton vs. Ins. Co., 16 Barb. (N. Y.), 234; Huckins vs. Ins. Co., 11 Fost. (N. H.), 238; Storer vs. Ins. Co., 45 Me., 173; Burgess vs. Alliance Ins. Co., 40 Allen (Mass.), 221; City F. Ins. Co. of Hartford vs. Mark, 45 Ill., 482; Peoria M. & F. Ins. Co. vs. Anapow, 51 Ill., 283; Liddle vs. Market F. Ins. Co., 4 Bosw. (N. Y.), 179.

b. The term stock in trade, unless otherwise limited, is more extended in its signification, and may include the implements needed to carry on the business as well as the goods or manufactured products.

Moadinger vs. Ins. Co., 2 Hall (N. Y.), 490; Crosby vs. Franklin Ins. Co., 5 Gray (Mass.), 504; Haley vs. Dorchester M. F. Ins. Co., 12 Gray (Mass.), 545.

c. Where the goods or stock are specifically described as "consisting of" a certain class of property, they will be limited to such class, but otherwise where they are described as "including." Memorandum articles specially excepted by the policy are not included.

Rafael vs. Nashville M. & F. Ins. Co., 7 La. An., 244; Webb vs. Ins. Co., 2 Sandf. (N. Y.), 497; Moadinger vs. Ins. Co., *supra*; Welles vs. Boston Ins. Co., 6 Pick. (Mass.), 132.

d. Merchandise held in trust by a warehouseman may include articles stored and not intended for sale.

Siter vs. Morris, 13 Penn. St., 218.

e. Goods and merchandise in the hands of factors, bailees, etc., may usually be insured generally, to the extent of their interest or liability, and insurance may be valid if so expressed, even after a sale until delivery. But where the policy stipulates that the interest will not be covered unless specified, no recovery can be had where the ownership is in another. Insurance on goods

“held on commission” or “in trust,” etc., covers the whole value of the goods, not simply the interest of insured, unless otherwise specified.

Parks vs. Ass. Co., 5 Pick. (Mass.), 34; *De Forest vs. Ins. Co.*, 1 Hall (N.Y.), 48; *Turner vs. Stetts*, 28 Ala., 420; *Lee vs. Howard F. Ins. Co.*, 11 Cush. (Mass.), 324; *Waring vs. Ins. Co.*, 6 Hand, 606; *Brichta vs. Ins. Co.*, 2 Hall (N. Y.), 372.

f. Household goods and furniture are limited to articles designed for the comfort or ornament of the house, and which are removable at will and not fixtures. They do not include articles intended for personal use or adornment, nor such as are consumed in their use, or are simply kept as merchandise for sale, unless so designated.

Holmes vs. Charleston Mut. Ins. Co., 10 Met. (Mass.), 211; *Clarke vs. Firemen's Ins. Co.*, 18 La., 431; *Clarey vs. Ins. Co.*, *Wright* (Ohio), 227.

See further on this subject under CONSIGNEE, INSURABLE INTEREST, TITLE.

See Cross Index for cases bearing on GOODS AND MERCHANDISE.

GUNPOWDER.

See KEEPING AND STORING, PROHIBITED RISKS, RISK.

See Cross Index for cases bearing on GUNPOWDER.

HAZARDOUS ARTICLES AND TRADES.

ABSTRACT OF THE LAW.

a. General printed clauses in policies, describing certain classes of goods or occupations as hazardous, extra hazardous, etc., accompanied by a prohibition against the keeping or use, will generally cause a forfeiture if violated, either at the inception or during the subsistence of the policy, provided the violation continues at the time of loss.

Appleby vs. Ins. Co., 45 Barb. (N. Y.), 454; *Washington Mut. Ins. Co. vs. Ins. Co.*, 5 Ohio St., 450; *Merrick vs. Prov. Ins. Co.*, 14 W. C. Q. B., 439; *Howell vs. Balt. Eq. Soc.*, 16 Md., 377.

b. But where the hazardous use is incidental to the trade or business insured, the insurers will be presumed to know the fact, and the written portion of the contract will overrule a general printed prohibition.

Harper vs. Albany Mut. Ins. Co., 17 N. Y., 194; *Brown vs. Kings Co. F. Ins. Co.*, 31 How. (N. Y.), 508; *Bryant vs. Ins. Co.*, 17 N. Y., 194; *Citizens' Ins. Co. vs. McLaughlin*, 3 P. F. Smith, 485.

c. The description of property or goods in the contract as “not hazardous,” “hazardous,” etc., restricts its use to the class stated and to classes less hazardous, unless the written portion by implication or usage permits a more hazardous use or keeping.

Richards vs. Prot. Ins. Co., 30 Me., 273; *Whitmarsh vs. Charter Oak Ins. Co.*, 2 Allen, 581; *Pindar vs. Continental Ins. Co.*, 38 N. Y., 864; *Wood vs. Hartford F. Ins. Co.*, 13 Conn., 533; *Niagara F. Ins. Co. vs. DeGraff*, 12 Mich., 124.

d. Usage however cannot be pleaded against a stipulation that the use of general terms shall not be construed as a waiver of the printed prohibition, or any other prohibition equally explicit, incorporated in the policy.

People's Ins. Co. vs. Kuhn, Tenn. S. C.

See further on this subject under POLICY, RISK, USE, USAGE.

See Cross Index for cases bearing on HAZARDOUS ARTICLES AND TRADES.

INCREASE OF RISK.

See RISK.

See Cross Index for cases bearing on INCREASE OF RISK.

INCUMBRANCE.

ABSTRACT OF THE LAW.

a. As a rule, any valid lien which attaches specially against the subject of insurance, is an incumbrance, but not a remote or contingent liability in which the subject of insurance shares only in common with other property of the insured.

Jackson vs. Farmers' Mut. Ins. Co., 5 Gray (Mass.), 52; *Wilbur vs. Bowditch Ins. Co.*, 10 Cush., 446; *Summerset Ins. Co. vs. McAnally*, 46 Penn. St., 41.

b. A mortgage valid as against the insured, though void as to third parties, mechanics' liens, attachments, assessments on premium notes when made a special lien upon the property, tax liens, purchase money due, are all valid incumbrances.

Treadway vs. Hamilton Ins. Co., 29 Conn., 68; *Packard vs. Agamon Ins. Co.*, 2 Gray (Mass.), 334; *Brown vs. Commonwealth Ins. Co.*, 41 Penn. St., 187; *Jackson vs. Farmers' M. & F. Ins. Co.*, 5 Gray (Mass.), 52; *Wilber vs. Bowditch Ins. Co.*, 10 Cush. (Mass.), 446.

c. But a mere formal incumbrance is not usually within the policy.

Hawks vs. Ins. Co., 11 Wis., 183; *Newhall vs. Union Mut. Ins. Co.*, 52 Me., 183.

d. Statements as to incumbrance are material to the risk. A failure to state

incumbrance when called for, will usually avoid the policy, and the same is true of statements materially incorrect or untrue. But a general statement of the facts is usually sufficient, and the issue of the policy upon such statement is a waiver of fuller details by the insured.

Nichols vs. Fayette M. & F. Ins. Co., 1 Allen (Mass.), 63 ; *Smith vs. Empire Ins. Co.*, 26 Barb. (N. Y.), 497 ; *Upton vs. M. & F. Ins. Co.*, 38 N. H., 338 ; *Gallager vs. Union Mut. Ins. Co.*, 43 N. H., 176 ; *Hayward vs. N. E. Ins. Co.*, 10 Cush. (Mass.), 444 ; *Loehnes vs. Home Ins. Co.*, 17 Mo., 247.

e. An incumbrance upon the property is not an incumbrance upon a mechanics' lien insured as such, but otherwise as to mortgage interests.

Smith vs. Columbia Ins. Co., 17 Penn. St., 253 ; *Longhurst vs. Conway Ins. Co.*, U. S. D. C. Iowa.

f. Subsequent incumbrances need not be stated unless required by special stipulation.

Howard Ins. Co. vs. Bruner, 23 Penn. St., 50.

See further on this subject under ALIENATION, APPLICATION, INSURABLE INTEREST, MORTGAGOR AND MORTGAGEE, POLICY, REPRESENTATION, TITLE, WARRANTY, WAIVER.

DIGEST OF RECENT CASES.

INCUMBRANCE—WHEN THE POLICY IS AVOIDED BY.

1. A proviso requiring notification of subsequent incumbrance, under penalty of forfeiture, is not captious, but important in the interest of the company and of public policy.

Columbian Ins. Co. vs. Lawrence, 2 Peters, 25 ; *Hinman vs. Ins. Co.*, S. C. Wis., (3 Ins. Law Jour., 813.)

A known breach of such condition amounts to a voluntary abandonment of the insurance. A breach through ignorance is an involuntary and negligent ignorance which avoids the policy.

Edwards vs. Ins. Co., 1 Allen, 310 ; *Brown vs. Ins. Co.*, 41 Penn. St., 187 ; *Penn Ins. Co. vs. Gottsman*, 43 Penn. St., 151 ; *Dodge Co. Ins. Co. vs. Rogers*, 12 Wis., 337 ; *Wustum vs. Ins. Co.*, 15 Wis., 138 ; *Keeler vs. Ins. Co.*, 16 Wis., 523.

Fuller vs. Madison Mut. Ins. Co., Wis. S. C., 36 Wis., 599 ; 4 Ins. Law Jour., 841.

2. In an action on a policy of insurance on a mill and machinery, the answer was that, by their application for insurance, plaintiffs represented and warranted that, at the time the policy was issued, there was but \$5,000 incumbrance on the property ; whereas, in fact there were incumbrances thereon largely in excess of that

sum, but the nature of such additional incumbrance was not averred. Plaintiffs went to trial without demurrer or motion to make the answer more definite and certain. *Held*, that a subsisting lien of a mechanic or a material man, for which a petition has been filed, is an incumbrance, within the ordinary meaning of the word. *Held*, that, under the pleadings, it was error to reject evidence offered by defendant of such an incumbrance existing at the time of the application, and not mentioned therein.

Citing and discussing *Robson vs. Comstock*, 8 Wis., 372; *Morse vs. Gilman*, 16 Wis., 504; *Luth. Ev. Church vs. Gristgan*, 24 Wis., 328; *Hazleton vs. The Bank*, 32 Wis., 34; *Tutshorn vs. Hull*, 30 Wis., 162; *Flanders vs. McVicker*, 7 Wis., 372; *Morse vs. Gilman*, 16 Wis., 531; *Grannis vs. Hooker*, 29 Wis., 65; *People vs. Ryder*, 12 N. Y., 433; *Prindle vs. Caruthers*, 15 N. Y., 425; 2 *Wait's Practice*, 500; *Thurber vs. Jones*, 14 Wis., 16; *Schmidt vs. Pfeil*, 24 Wis., 452; *Petit vs. Hamlyn*, 43 Wis., 314; *Hall vs. Hinckley*, 32 Wis., 362.

Redmon vs. Phoenix F. Ins. Co., Wis. S. C., 10 *Ins. Law Jour.*, 287.

3. Where in the body of a policy of insurance it is stipulated that payment is to be made after notice, proof and adjustment of the loss "in conformity to the annexed conditions," the conditions printed on the back of the policy, although unsigned, form a part of the contract of insurance. Where one of these conditions provides, that "should, during the life of this policy, an incumbrance fall * * * upon the property insured, sufficient to reduce the real interest of the insured in the same to a sum equal to or below the amount insured * * * the policy shall be void," and the insured confesses a judgment for an amount in excess of the value of the property, an incumbrance falls within the meaning of the terms of the policy, and it is thereby avoided.

Banks vs. Yerkes, Pa. S. C., 80 *Penn.*, 227.

WHEN THE POLICY IS NOT AVOIDED BY.

4. Where a mill and house were mortgaged for \$2,000, which was stated to the agent, and he of his own motion apportioned it between the two in the applications, and in the application and policy for the mill he stated it at \$1,000; *Held*, that there was no such mistake as required a reformation. Evidence was

admissible to estop the company from alleging false representations.

Ring vs. Windsor Ins. Co., Vt. S. C.

5. A policy condition that the company shall not be liable, "if without the consent of the company written on the policy, the property shall hereafter become incumbered in any way," refers only to incumbrances created by act of insured, and has no reference to judgments or incumbrances created by the operation of law, such as tax liens. The condition should be construed the same as conditions in leases against assignments.

Barlow vs. St. Nicholas Bank, 63 N. Y., 399; 4 Kent, 124.

When a clause in a contract is capable of two constructions that will be preferred which will sustain, rather than that which will defeat the obligation.

Case of Eagen vs. Mut. Ins. Co., 5 Denio, 326, distinguished.

Baley vs. Homestead F. Ins. Co., N. Y. C. A., 80 N. Y., 21; 9 *Ins. Law Jour.*, 187.

6. The insured had a contract to build a hotel, and before completion, failing to secure his payments, stopped work and took the necessary steps to secure a mechanic's lien, and commenced his action to perfect the lien within the period prescribed by law. While the action was pending he procured the insurance on his interest as contractor. The building was burned before the lien was perfected, and the insured thereupon discontinued further action to perfect the lien, but sued to recover on the policy. *Held*, that the insured was not obligated to perfect his lien for the benefit of the insurer, unless the latter paid the insurance, demanded to be subrogated and tendered the sum necessary to indemnify him against the expenses.

May on Ins., § 457; *Sussex Co. Ins. Co. vs. Woodruff*, 2 Dutch., 541.

There was a prior mortgage against the property on which the building was erected to which the lien was subject. *Held*, that the contractor was in the same position as an owner of the building, and had an insurable interest to the extent of its value, notwithstanding the mortgage.

May on Ins., §§ 81, 82; *Columbia Ins. Co. vs. Lawrence*, 2 Pet., 46.

Royal Ins. Co. vs. Stinson, U. S. S. C., 10 *Ins. Law Jour.*, 687.

7. The policy was on a dwelling-house "to B.'s heirs," who were the owners thereof, subject to an unassigned dower interest therein, or their mother, the widow of B. The application, which was made part of the policy, was made by the widow, and contained a representation that the property was in the occupancy of the applicant, and was not incumbered. It was stipulated in the policy that "if the premises insured herein be incumbered in any way, this policy shall be void, unless the true title of the assured, and the incumbrance on the premises, be expressed in the application." In an action by said heirs upon the policy to recover the loss insured against, the property having been consumed by fire, the company claimed that the dower interest of the widow was an incumbrance that avoided the policy. *Held*, whether the dower right of the widow was an incumbrance or not, within the above stipulation, she having an insurable interest in the property, the application is to be regarded as referring to that interest, as well as to the interest of the heirs of B., and hence, that the representation in the application, that the property was not incumbered, was true.

Ohio Farmers' Ins. Co. vs. Britton, O. S. C., 31 O., 488; 7 Ins. Law Jour., 632.

8. The policy, insuring C., was payable to J. as his mortgage interest should appear, and provided that in case of loss immediate notice should be given by the assured. After the fire C. assigned the policy to D., who also held a mortgage of all interest above the claims of J. *Held*, that notice given by J. and D. was sufficient compliance with the requirement, C. having parted with all his interest. *Held*, that J. and D. having assigned all their rights to the S. M. Co., the latter could bring action in its own name. The mortgage given to D., was invalid by reason of being upon a homestead, in which the wife did not join. *Held*, that this was not such an incumbrance on the premises as would avoid the policy under a provision against transfer without notice or consent. A valid incumbrance would render void the policy, irrespective of what opinion the assured might entertain in reference thereto. The legality or illegality of the incumbrance, and not the intention of the assured, must govern.

Sutherland vs. Old Dominion Ins. Co., Sup. Ct. of Va.; Hubbard vs. Hartford F. Ins. Co., 11th Am. R., 125; Thomas vs. Builders' F. Ins. Co., 20 Am. R., 317; Knight vs. Eureka Ins. Co., id., 778; Lindley vs. Union Ins. Co., id., 701.

Watertown F. Ins. Co. vs. Grover & Baker Sewing Machine Co., Mich. S. C., 8 Ins. Law Jour., 705.

9. A judgment entered against one of several partners owning a saw-mill and the land on which it is situate, is not such incumbrance within the meaning of the question in an application for insurance: "Is there any incumbrance on the property?" as requires the court to decide as matter of law that such a judgment is a breach of the warranty against incumbrances made by the firm in their application for insurance.

Miller et al. vs. Germania Ins. Co., Tioga Co. (Pa.) C. P., 6 Ins. Law Jour., 873. /

See Cross Index for other cases bearing on INCUMBRANCE.

INDIVIDUAL UNDERWRITING.

DIGEST OF RECENT CASES.

1. An agreement between the members of an association, that the agent of the association shall have authority to sue delinquent members on behalf of the partnership, is a contract that the law does not recognize. When an agent of an underwriters' association signs the policy for the membership, he cannot maintain a suit in his own name for any sum due the association thereon, for he is not liable to the assured, the engagement being on behalf of the principals, and therefore there is no consideration from him to sustain the contract.

Evans vs. Hooper, Eng. C. A., 5 Ins. Law Jour., 637.

See Cross Index for other cases bearing on INDIVIDUAL UNDERWRITING.

INSOLVENCY.

ABSTRACT OF THE LAW.

a. The power of the officers and stockholders under the charter, becomes vested in the courts by an adjudication of bankruptcy, and the same assessments may be levied by the court as could have been done by the officers.

Upton vs. Hansbrough, 5 Chicago Legal News, 242.

b. The assignee, however, has not the full power of the officers; he is a trustee of the creditors, and cannot waive performance of conditions as the company might have done.

In re Firemen's Ins. Co., 5 Chicago Legal News, 253.

c. A receiver derives no additional powers from insolvency and can maintain no suits, otherwise, than as the directors might have done. Like an assignee, he has no right to waive the performance of conditions.

Sands vs. Hill, 42 Barb. (N. Y.), 651; *Shaughnessy vs. Ins. Co.*, 21 Barb. (N. Y.), 605; *Evans vs. Ins. Co.*, 9 Allen (Mass.), 329.

d. A liquidated debt due an insolvent company, may usually be set off against one which is unliquidated, but claims purchased with full knowledge of insolvency cannot thus be set off.

Receivers of Globe Ins. Co., 2 Edw. Ch., 625; *Commonwealth vs. Shoe & Leather Dealers' Ins. Co.*, 112 Mass., 131; *Smith vs. Hill*, 8 Gray (Mass.), 572.

e. Members of mutual companies cannot set off loss claims against premium note assessments.

Hillier vs. Ins. Co., 3 Penn. St., 470; *Long vs. Penn. Ins. Co.*, 6 Penn. St., 421; *Lawrence vs. Nelson*, 21 N. Y., 158.

DIGEST OF RECENT CASES.

INSOLVENCY—WHAT MAY AND WHAT MAY NOT BE SET OFF.

1. Ordinary debts due an insolvent company may be set off against claims. But losses on policies cannot be set off against liabilities for subscribed stock. Nor can a person procure the assignment of a policy for the purpose of such set-off.

Scanmon vs. Kimball and Drake vs. Rollo, U. S. S. C.

Hitchcock vs. Rollo, U. S. C. C., N. D. Ill., 2 Ins. Law Jour., 755.

2. The reinsurer purchased at a discount several policies which

had become claims, and which had been issued by an insolvent company and reinsured by itself. *Held*, that the act was legal and the reinsurer was entitled to have them set off against claims from the reinsured at their face value.

Hovey et al. vs. Home Ins. Co., U. S. C. C., Ohio; 3 Ins. Law Jour., 801.

3. Debt due to a stockholder of a bankrupt company for losses sustained by the stockholders of properties insured by the company, cannot be set off against his indebtedness for unpaid shares.

U. S. vs. Eckford, 6 Wall., 488; Sawyer vs. Hoag, 17 Wall., 610; Adams Eq., 6th Am. ed., 447; 2 Story's Eq., 6th ed., § 1437; R. R. Co., vs. Howard, 7 Wall., 416; 2 Story's Eq., 9th ed., § 1252; Munma vs. Potomac, 8 Pet., 286; Wood vs. Dummer, 3 Mason, 303; Vose vs. Grant, 15 Mass., 522; Spear vs. Grant, 16 ib., 14; Curran vs. Arkansas, 15 How., 307.

Claims for losses cannot be set off against the notes given for stock. But money deposited with a private banker by the company, and held by him as private banker, may be set off against losses for which the company is liable as insurers under certain circumstances.

Thompson vs. Riggs, 5 Wall., 678; Bank vs. Wister, 2 Pet., 325; Marine Bank vs. Fulton Bank, 2 Wall., 256; Hill on Trustees, 4th Am. ed., 173; Devaynes vs. Noble, 1 Merivale, 561; Sims vs. Bond, 2 Barn. & Adol., 392; Pott vs. Clegg, 16 Mees. & Wels., 327.

Scammon vs. Kimball, assignee of Mutual Security Ins. Co., U. S. S. C., 5 Ins. Law Jour., 266.

4. Parol evidence of an alleged oral agreement at the time of making or indorsing a bill or note, cannot be permitted to vary the terms of the written contract.

2 Parsons on Bills and Notes, 501; Specht vs. Howard, 16 Wall., 564.

In the absence of fraud the rule is the same in equity as in law.

2 Story's Eq., § 1531.

Where the notes of five brothers, in different sums, were given a fire insurance company for a loan negotiated by one of them, and the money invested in real estate by each, on which mortgages were given as further security, one of the five may not allege an oral agreement by which he alone was the responsible borrower, and upon the transfer to him of the several mortgaged

premises by the others, claim that money due him, for loss by fire, from the company since bankruptcy, shall be set off against the whole.

Forsythe vs. Kimball, assignee, U. S. S. C., 5 Ins. Law Jour., 577.

EFFECT ON POLICY AND LOSS CLAIMS.

5. A loss upon a policy issued by a fire insurance company, happening after such company is thrown into bankruptcy, and before the final dividend, is a debt provable against such company.

In re Pl. Glass Co., U. S. Dist. Court, N. J., 12 N. B. R., No. 2., 4 Ins. Law Jour., 938.

6. When the reinsured company is bankrupt, a provision in the policies of a reinsurer, that the loss should be payable *pro rata* with those of the reinsured and not otherwise, is no defense against a recovery against the reinsurer.

Walker, assignee of North Mo. Ins. Co. vs. Clay F. & M. Ins. Co., U. S. C. C., Ky.

7. The loss claimant against a bankrupt company in Illinois, in accordance with an order of the court, presented his claim and made proof before the master appointed to take proof of claims. *Held*, that exceptions to the master's allowance of the claim should have been taken before the master and disallowed by him in order to be heard by the Circuit Court.

McClay vs. Norris, 4 Gilm., 370; Brockman vs. Aulger, 12 Ill., 277.

Held, that where the bill appointing the receiver was filed under the general chancery powers of the courts and not under the statute, all creditors of the company had the right to present their claims, with the proof, before the master for allowance, whether or not named as parties in the bill, or whether judgment, specialty, or simple contract creditors.

Daniels Ch. Pr., vol. 1, p. 123, and vol. 2, p. 864.

The policy required notice forthwith, and as soon after as practicable a particular account of the loss, signed and sworn to. Ten days after the loss the insured delivered to the agent a builder's estimate sworn to, and was then informed by the agent

that the company was bankrupt, and upon inquiry he could find no office of the company thereafter in Chicago, nor did they have any; another agent confirmed the statement of the first. *Held*, that notwithstanding there was no formal proof filed, plaintiff was entitled to prove his claim before the master, under the decree in equity. The policy required commencement of the suit within one year. But the insured was acting under the mistake that the company was worthless. Before the expiration of the year the court, on the application of other creditors, had taken hold of the funds of the company as a trust fund for the relief of all the creditors. *Held*, that the appearance and proof of claim by insured before the master, answered in equity the requirement of the policy.

Pennell vs. Chandler, Ill. S. C., 5 Ins. Law Jour., 107.

8. Defendant had effected a loan of plaintiff on bond and mortgage, and the policy, which was in the name of defendant, provided according to agreement that the loss should be payable to plaintiff, etc. After the loss, defendant negotiated with plaintiff for a renewal of the loan on other property, and plaintiff delayed collecting the amount of the loss for a month, when the insurer failed. *Held*, that a creditor holding collaterals, is bound to use reasonable diligence in collecting them when due, and is responsible for loss resulting from neglect or delay. *Held*, that the delay to collect for a month was *prima facie* evidence of negligence. *Held*, that negotiation for a new loan did not excuse the delay; the legal right to the money was in the plaintiff. *Held*, that the burden of proof to show negligence was on the plaintiff, and in the absence of such proof, defendant was entitled to have the loss deducted from the mortgage debt.

Plant. M. Ins. Co. vs. Falvey, 20 Wis., 20.

Charter Oak Life Ins. Co. vs. Smith, Wis. S. C., 7 Ins. Law Jour., 299.

9. Appellant's firm, as insurance agents, effected a loan for one R., who became bankrupt afterward. A certain sum was left by R. in appellant's hands to effect insurance risks and pay premiums. R.'s assignee in bankruptcy, L., sued for this money and recovered a judgment. *Held*, that if in such case the agent has so

acted on the fund as to have acquired a vested interest therein, an assignee in bankruptcy cannot take it out of the insurance agent's hands.

Newcomb vs. Launtz, Ill. S. C., 7 Ins. Law Jour., 924.

10. Where a director, officer and member of the finance committee of the company bought up claims at a discount; *Held*, that he was a trustee and could not profit by his trust. He can only prove against the assignee in bankruptcy for the amount actually expended.

Stillwell vs. Walker, assignee of State Ins. Co. of Mo., U. S. D. C., E. D. Mo.

LIABILITY OF STOCKHOLDERS.

11. Fraudulent representations on the part of the company would be a good defense against a note given for stock, but is not against the assignee in bankruptcy after a delay for two years to take any steps in repudiation of the note.

Farrar vs. assignee of North Mo. Ins. Co., U. S. C. C., E. D. Mo.

12. The fact that subscribed stock was to remain unpaid until called for by vote of directors, is no defense against payment after insolvency where the call was directed to be made by the court.

Major vs. Upton, assignee of Great Western Ins. Co., U. S. S. C.

13. One who has taken part in the organization, subscribed for stock, and acted as an officer, cannot set up irregularity in the organization as against a suit by assignee for his subscription.

Church vs. Upton, assignee, etc., U. S. S. C.

14. A court of equity has no right to confer upon the receiver of a bankrupt insurance corporation, power to compromise with the stockholders.

Chamber vs. Brown, Ill. S. C.

15. The assignee of stock of an insolvent company is liable, though he holds it simply as collateral, since the transfer on the books releases the former owner.

Pullman vs. Upton, assignee, etc., U. S. S. C.

16. One who contracts with a corporation, cannot allege in defense the irregularities of its organization, and one who receives a certificate of stock at a given sum per share, is liable for the amount in case of insolvency.

Chubb vs. Upton, assignee of G. W. Ins. Co., U. S. S. C.

17. Where the company passed a resolution declaring the unpaid stock non-assessable, and the words "non-assessable" were printed across the certificate of stock; *Held*, that the stockholders or directors had no power to limit or exempt the stockholders from liability as against creditors. *Held*, that the assignee in bankruptcy represents the interests of creditors as well as the bankrupt, and can recover so far as touches the validity of the stock as if acting solely in the interest of creditors.

Upton vs. Jackson, U. S. C. C., 4 Ins. Law Jour., 189.

18. Equities existing between a corporation and subscribers to its stock on the ground of misrepresentation, cannot be alleged as against those who have become creditors on the faith of such subscriptions. Where the directors of an insolvent company had the power to assess the unpaid stock to pay its debts, the creditors might have compelled the exercise of this power, and the assignee in bankruptcy, acting under direction and authority of the court, would have a right to exercise the same power.

Michener vs. Payson, assignee, U. S. C. C., 5 Ins. Law Jour., 116.

19. Any contract between the company or its agents, and the stockholders, limiting their liability as to unpaid installments of stock, is void as to creditors of the company and as to the rights of the assignee in bankruptcy.

Brigham vs. Mead, 10 Allen, 245; *Buff. City R. R. Co. vs. Douglas*, 14 N. Y., 336; *Seymour vs. Sturges*, 26 N. Y. R., 134; *Sawyer vs. Hoag*, 17 Wall., 610; *Tuckerman vs. Brown*, 33 N. Y., 297; *Ogilvie vs. Knox Ins. Co.*, 22 How., 380; *Osgood vs. Laytin*, 3 Keyes, 521; 37 How. Pr. R., 63, affg. 48 Barb., 463; Gros. Ill. St., p. 356, § 16.

Where T. became a stockholder of the Great Western Insurance Company, in August, 1870, and so continued until after its insolvency in February, 1873; *Held*, that any representations made by any agent of the company at the time of becoming a stockholder, as to his liability for eighty per cent of unpaid stock,

or any indorsement on the stock of the words "non-assessable," are wholly immaterial, and constitute no defense in an action brought by the assignee in bankruptcy.

Palmer vs. Lawrence, 3 Sand. S. C. R., 761; Brigham vs. Mead, 10 Allen, 246; Leavitt vs. Palmer, 3 N. Y., 19.

Where T. was induced to become a stockholder by fraud, evidence of an offer to surrender his stock to the company, and of a subsequent repudiation of membership, not upon the ground that he had been induced to subscribe for the stock upon a fraudulent representation as to his liability for the unpaid portion, but upon the ground that the company had wrongfully sold and assigned his note and mortgages, is immaterial in an action by the assignee in bankruptcy to recover on the unpaid stock.

Pettibone vs. Stevens, 15 Conn. R., 19; Beers vs. Bottsford, 13 ib., 146; Wright's case, Law Rep., Eq., 12, 1871, p. 331-351; Henderson vs. Royal British Bank, 7 E. & B., 356; Parris vs. Harding, 1 C. B. N. S., 533; Oates vs. Turquand, L. R., 2 Ap. Cas., 325.

A party claiming to have been drawn into a fraudulent purchase, must use reasonable diligence to discover and repudiate his purchase. To subscribe for stock in August, 1870, and rest quietly until 1873, when the assignee made demand for an unpaid subscription, is far from using the due diligence which the law requires in discovering fraud.

Thomas vs. Barton, 48 N. Y. R., 193; Buford vs. Brown, 6 B. Munroe, 553; Beckford vs. Wade, 17 Ves., 87-97; Jones vs. Tuberville, 2 Ves., jr., 11; Duke of Beaufort vs. Neald, 2 Cl. & F., 248-286; Smith's case, L. R., 2 Ch. Ap., 613; Denton vs. MacNeil, L. R., 2 Eq., 532; Peel's case, L. R., 2 Ch. Ap., 684.

Upton vs. Tribilcock, U. S. C. C., 5 Ins. Law Jour., 97.

20. The United States District Court, upon adjudicating a company bankrupt and appointing an assignee, may, without notice to the stockholders, order the stockholders to pay to the assignee an unpaid balance upon their stock. The stockholders may not question the validity of the order in a suit instituted by the assignee. The court has the same right as the directors to order payment.

Hall vs. U. S. Ins. Co., 5 Gill., 484; Sagory vs. Dubois, 3 Sandf. Ch. Rep., 510; Kennedy vs. Gibson, 8 Wall., 505; Cadle, receiver, vs. Baker & Co., 20 Wall., 650; Ward vs. Griswold Manuf. Co., 16 Conn., 599; Adler vs. Mil. Pat. Brick Co., 13 Wis., 61; Man vs. Pentz, 2 Sandf. Chy., 285.

Agreements that no farther call is to be made, or that payment may be made in any other medium than money, are void as to creditors; nor can the owner escape liability by taking it in the name of his infant children, nor by showing that he holds as agent for another.

3 Sandf. Chy., *supra*; Henry et al. vs. Vermillion, etc., 17 Ohio St., 187; Roman vs. Fry, 6 J. J. Marshall, 634; Allibone vs. Hager, 46 Pa. St., 48.

The capital stock of a corporation is a fund set apart for the payment of its debts, upon which creditors have a lien in equity. Unpaid stock is as much a part of the assets as any other property of the company, and creditors have the same right to insist upon its payment as upon the payment of any other debt due the company.

Curren vs. Arkansas, 15 How., 308; Wood vs. Dummer, 3 Mason, 308; Slee vs. Bloom, 19 Johnson, 474; Briggs vs. Penniman, 8 Cow., 387; Society, etc., vs. Abbott, 2 Beav., 559; Walworth vs. Holt, 4 Mylne & Craig, 789; Ward vs. Griswoldville Mfg. Co., 16 Conn., 598; Fowler vs. Robinson, 31 Me., 789; Angell & A. on Con., sec. 600 *et post*; Wright vs. Petrie, 1 Smedes & M., 319; Nevitt vs. Bk. Port Gibson, 6 ib.; Nathan vs. Whitelock, 3 Edw. C. R., 215; Dr. Salmon vs. Hanborough Co., 1 Cases in Chy., 204; 6 Viner's Abridg., 310-311; Curson vs. African Co., 1 Vernon, 124; Bump on Bankruptcy, 473, 478, 528.

The assignee may sue in an action at law, or maintain a bill in equity, against all the delinquent stockholders jointly.

Hall vs. U. S. Ins. Co., 5 Gill., 484; Oglevie et al. vs. Knox Ins. Co., et al., 22 How., 280.

Where, though there was no evidence that the plaintiff had subscribed for the stock, or had made any express contract with the company in regard to it, it appeared that she had bought it and made the required payments, and had received a dividend; *Held*, that she was estopped from denying her ownership in an action by the assignee for an unpaid balance.

Ellis vs. Schmoeck & Thomas, 5 Bing., 521; Doubleday vs. Musket et al., 7 ib., 110; Harvey et al. vs. Kay, 9 Barn. & Cress., 355; Upton vs. Tribblecock, U. S. S. C., 5 Ins. L. J., 97; Eaton et al. vs. Aspinwall, 19 N. Y., 119; Abbott vs. Aspinwall, 26 Barb., 202; Goodwin et al. vs. Gilbert et al., 9 Mass., 484; Finley vs. Simpson, 2 Zab., 310.

Sanger vs. Upton, assignee, U. S. S. C., 91 U. S., 56; 6 Ins. Law Jour., 618.

21. Section 32 of the insurance law of Missouri confers upon the courts, in proceedings instituted against an insurance com-

pany under that law by the superintendent of the insurance department, power to appoint agents or receivers to take possession of the property of the company and to make such orders and decrees as may be needful to suspend, restrain or prohibit the further continuance of the business of the company, or for the dissolution of the company and the winding up of its affairs. *Held*, that the general power of making all needful orders for winding up the affairs of the company thus conferred included the power to make an order authorizing and directing a receiver appointed in such a proceeding, to bring suit in his own name for the assets of the company; and that a suit so brought under such an order could be maintained. The board of directors of an insurance company, knowing that their company had just been reported by an official examiner to the superintendent of the insurance department as being in an unsound condition, and that that officer would probably institute legal proceedings to have the company wound up, passed a resolution to the effect that all stockholders who would pay five per cent on their stock (on which ninety per cent was unpaid,) and would surrender their stock certificates to the company, should have the privilege of retiring from the company, and withdrawing their stock notes. If all the stockholders had acted on this resolution, the company would have had the means of paying about one-half of its ascertained liabilities, and no more, with no provision for its outstanding policies. *Held*, that the resolution was a fraud in law, if not in fact, upon the creditors of the company, and was no protection, as against them, to those stockholders who had availed themselves of its provisions. The board of directors of a corporation have no power to diminish the capital stock of the corporation unless authorized by a vote of the stockholders.

Railway Co. vs. Allerton, 18 Wall., 233; Upton vs. Tribbick, 91 U. S., 45; Thompson on Stockholders, sec's 201, 202.

An attempt on the part of a portion of the stockholders of a corporation to withdraw from the corporation before all its debts are paid, by canceling their stock, will be none the less void because enough remain to meet the claims of creditors.

Bedford R. R. Co. vs. Bowser, 48 P. St., 29; Spackman vs. Evans, L. R., 3 H. L. Cas., 186.

Gill vs. Balis, Mo. S. C., 10 Ins. Law Jour., 596.

22. In an action upon a stock subscription to an insolvent insurance company, the petition alleged the subscription and giving of stock notes for unpaid portion, payable on call of directors; insolvency of company, and facts of no assets except the stock notes; appointment of receiver by the Superior Court of Cook County, Ill., and a petition by the receiver setting out that all the creditors of the company had appeared in the proceedings and proved their claims; that the stock notes were the only assets; that part of the stockholders had paid voluntarily; that part of the creditor's claims had been paid, but more could not until further collections were made; that the stockholders numbered 1,800, many dead, many insolvent, and many non-residents of Illinois; that all could not be joined in one action, but four had been served with process; that upon such petition the Superior Court ordered notice by publication to be given of the application to assess the stockholders, and the four served were required to answer for all; that afterwards, publication, etc., having been made, and no appearance or answer being made, an assessment of \$40 per share was made, and the receiver was authorized to sue for and recover the same. *Held*, as to a non-resident stockholder, the Superior Court of Chicago acquired no jurisdiction of his person, and demurrer to the petition was properly sustained.

Chandler vs. Brown, 77 Ill., 333; Chandler vs. Dore, 84 Ill., 275; distinguishing Sanger vs. Upton, 91 U. S., 56.

Lamar Ins. Co. vs. Hildreth, Iowa S. C., 10 *Ins. Law Jour.*, 183.

See Cross Index at end of volume, for other cases bearing on INSOLVENCY.

INSURABLE INTEREST.

ABSTRACT OF THE LAW.

a. Whatever furnishes a reasonable expectation of pecuniary benefit from the continued existence of the subject of insurance, is usually a valid insurable interest, but a mere remote contingency or expectancy not accompanied with any present interest, is not.

Warren vs. Davenport Fire Ins. Co., 31 Iowa, 465; Fenn vs. New Orleans Ins. Co., 53 Ga., 578; Routh vs. Thompson, 11 East., 426.

b. Legal possession is usually a sufficient interest to support a contract, when accompanied with any liability or responsibility for the safety of the property.

Sterling vs. Vaughan, 11 East., 619 ; *Barclay vs. Cousins*, 2 East., 544.

c. The mortgagor has an insurable interest so long as the right of redemption exists.

Allen vs. Franklin Ins. Co., 9 How. (N. Y.), 501 ; *Carpenter vs. Washington Ins., Co.*, 16 Pet. (U. S.), 475 ; *Addison vs. Louisville Ins. Co.*, 7 B. Mon., (Ky.), 470.

d. A mortgagee has an insurable interest to the extent of the debt, and such interest may remain even after the assignment of the mortgage, if he becomes a surety for the payment of the debt.

Keller vs. Merchants' Ins. Co., 7 La., 29 ; *Addison vs. Ins. Co.*, *supra* ; *N. E. F. Ins. Co. vs. Whetmore*, 32 Ill., 221.

e. Consignees, carriers, executors, administrators, trustees, warehousemen, pledgees, wharfingers, and sheriffs, all have insurable interests.

Phelps vs. Gebhard Ins. Co., 9 Bos., 404 ; *De Forest vs. Fulton Ins. Co.*, 1 Hall (N. Y.), 184 ; *Ætna Ins. Co. vs. Jackson*, 16 B. Mon. (Ky.), 242 ; *Eastern R. R. Co. vs. Relief Ins. Co.*, 19 Mass., 420.

f. Tenants liable as wrong doers, lessees, and landlords as to the goods of their tenants, have insurable interests.

Lawrence vs. Ins. Co., 43 Barb. (N. Y.), 479 ; *Mayor of N. Y. vs. Brooklyn Ins. Co.*, 41 Barb. (N. Y.), 231 ; *Columbia Ins. Co. vs. Cooper*, 50 Penn. St., 331.

g. A mere intruder has no insurable interest.

Sweeney vs. Franklin Ins. Co., 20 Penn. St., 337.

h. A stockholder owning all the stock, may have an insurable interest in the property which secures it.

Warren vs. Davenport F. Ins. Co., 31 Iowa, 463.

i. Partners have an insurable interest to the full value of the joint property.

Manhattan Ins. Co. vs. Webster, 57 Penn. St., 227 ; *Converse vs. Citizens' Ins. Co.*, 10 Cush., 37.

j. The interest must generally exist unless the risk be shifting, at the time of the insurance as well as at the time of loss, but if the contract be made in good faith, want of interest at the inception of the contract may sometimes be cured by its subsequent existence.

Howard vs. Albany Ins. Co., 3 Denio, 301 ; *Fowler vs. Indemnity Ins. Co.*, 26 N. Y., 422 ; *McLaren vs. Hartford F. Ins. Co.*, 5 N. Y., 151.

k. A mere temporary failure of interest will not always vitiate the contract.

Lane vs. Maine Ins. Co., 3 Fairf. (Me.), 44 ; *Cockerall vs. Cincinnati Ins. Co.*, 16 Ohio, 148.

See further on this subject under ALIENATION, APPLICATION, INCUMBRANCE, MORTGAGEE AND MORTGAGOR, POLICY, REPRESENTATION, TITLE, WARRANTY, WAIVER.

DIGEST OF RECENT CASES.

INSURABLE INTEREST—WHAT IS VALID.

1. Policy insuring owner, was made payable to lessee as indemnity against loss of rent and repairs, and afterward was assigned by latter to the owner. *Held*, that the owner had an insurable interest in the loss covered by the policy and was entitled to recover by virtue of the assignment.

Hand vs. Williamsburgh City Ins. Co., N. Y. Com. A., 3 Ins. Law Jour., 525.

2. Advances made in a foreign port on a vessel, constitute a lien and give an insurable interest. Contracts may be made by the master in a foreign port for necessary supplies and repairs, and are presumed to be on the credit of the vessel, unless the master has funds on hand of which the material men may know by using due diligence.

Merch. Mut. Ins. Co. vs. Baring et al., U. S. S. C., 3 Ins. Law Jour., 612.

3. One having property subject to his direction and control, whether as owner or agent, or otherwise, has an insurable interest for whom it may concern.

Lucena vs. Crawford, 5 Bros. & Pul., 269; Buck vs. Chesapeake Ins. Co., 1 Peters, U. S. S. C., 151; De Forrest vs. Fulton Fire Ins. Co., 1 Hall Sup. Ct. R., 84; Waring vs. Ind. Fire Ins. Co., 45 N. Y., 406.

Sturm vs. Atlantic Mut. Ins. Co., N. Y. C. A., 63 N. Y., 78; 5 Ins. Law Jour., 209.

4. A trustee has an insurable interest in property, which he may insure as "his," where the company knows the facts.

Babson vs. Thomaston Mut. F. Ins. Co., U. S. C. C. Mo., 3 Ins. Law Jour., 940.

5. A general creditor of the estate of one deceased, whose personal property left is insufficient for the payment of his debts, has an insurable interest in the sole real estate of the deceased debtor, when it is plain that if it is damaged by fire a pecuniary loss must ensue to the creditor thereby.

1 Arnold on Marine Ins., 229; Bun. on Life Ins., 16; Hughes on Ins., 30; 1 Marshall on Ins., 115; 1 Phillips on Ins., 2, 107; Sherman on Ins., 93; Parsons on Merc. Law, 507; Parsons on Cont., 438; Angel on Ins., sec. 56; Flanders on Fire Ins., 342; May on Ins., 76; Hancock vs. Ins. Co., 3 Sumner, 132-140; Putnam vs. Merc. Mar. Ins. Co., 5 Met., 386; Wilson vs. Jones, Law Rep., 2 Exch., 139; Buck vs. Ches. Ins. Co., 1 Peters, 151-163; Mapes vs. Coffin, 5 Paige, 296; Mickles vs. Rock City Bk., 11 Paige, 118; Ins. Co. vs. Allen, 43 N. Y., 389-95-6; Herkimer vs. Rice, 27 N. Y., 63; Savage vs. Howard Ins. Co., 52 N. Y., 502; Clinton vs. Hope Ins. Co., 45 N. Y., 454; Waring vs. Loder, 53 N. Y., 581.

Distinguishing Gravemeyer vs. Ins. Co., 62 Penn. St., 740; Conrad vs. Ins. Co., 1 Pet., 386; Cover vs. Black, 1 Barr., 493.

Rohrbach vs. Germania Fire Ins. Co., N. Y. C. A., 62 N. Y., 47; 4 Ins. Law Jour., 737.

6. The policy insured the interest of P., payable to C., a judgment creditor, who held an inchoate title to the premises by virtue of a sheriff's sale. When the policy was issued the right of redemption belonged to P. It had ceased at the time of the fire as to owner of the fee, but P. had still a right until after the fire to redeem, through other judgment creditors whom he might create. C. had contracted with P. that if he obtained a perfect title by lapse of time allowed for redemption, to have certain mortgage and judgment debts of P. satisfied. *Held*, that all this constituted an insurable interest in P.

Herkimer vs. Rice, 27 N. Y., 163; Stephens vs. Ill. Mut. Ins. Co., 43 Ill., 327; Strong vs. M. Ins. Co., 10 Pick., 41; Buffum vs. Bowditch Mut. Ins. Co., 10 Cush., 540; 2 R. S., 373, sec. 51; Cheeney vs. Woodruff, 45 N. Y., 98, 100, 101, and cases there cited; Waring vs. Loder, 53 N. Y., 581; Franklin Fire Ins. Co. vs. Findlay, 6 Wheat., 483; Lazarus vs. Com. Ins. Co., 19 Pick., 81.

Held, that it was not necessary to make P. a party in the suit. C. had a right to recover the whole, and held the surplus as trustee for P. The only interest of the company in the fact that C. had liens, was to ascertain if he had some such claim and was thereby entitled to sue.

Clinton vs. Hope Ins. Co., 45 N. Y., 544.

Cone vs. Niagara Fire Ins. Co., N. Y. C. A., 60 N. Y., 619; 4 Ins. Law Jour., 729.

7. P. leased three plantations to O. for three years, with all their appurtenances. O. sublet a portion to J. O. afterward gave several liens on the property and crops, as security to dif-

ferent parties, P., among the rest. J. agreed with O. to share a portion of the crop, and by further advances, claimed an additional interest in the same. The crop of cotton was in a gin-house held by J. under his sub-lease. J. made valuable additions to the gin-house, etc. Supposing O. to be the owner of the place, P. afterward took possession of the plantations for forfeiture of conditions, without objections from O. or anybody else. J. was not molested or in any way interfered with by P., but continued his active interest until the property was destroyed by fire. *Held*, that J. was not necessarily evicted by O.'s peaceable surrender of the title to P. His interest was not affected by the subsequent liens of O., and he had an insurable interest in the gin-house and its contents.

Code, 1871, § 1603; *Carter vs. Home Ins. Co.*, 12 Iowa, 287; 1 Ph. on Ins., 107, 108; *Tyler vs. Ætna Ins. Co.*, 16 Wend., 238; 7 La. An., 29; 7 B. Mon., 470; 14 Md., 235; *Stout vs. C. F. Ins. Co.*, 12 Ia., 371; 19 ib., 364; *Lynd vs. Hough*, 27 Barb., 415; *Spear vs. Fuller*, N. H. S. C.; 3 B. & A., 299; 3 Dana, 586; 3 Cush., 286; *Sanders*, 287; 2 Story Eq. Jur., §§ 1314, 1315, 1316; 15 John., 278.

Georgia Home Ins. Co. vs. Jones, S. C. Miss., 5 Ins. Law Jour., 88.

8. The policies agreed to "insure Messrs. Thompson & Co. against loss or damage by fire—upon whisky, their own, or held by them on commission, including government tax thereon for which they may be liable, contained in the log bonded warehouse of G. H. Deaven." The whisky was owned by Thompson & Co., Walston being the Co., who were also sureties on Deaven's distillery bond, and as such liable for the government tax if not paid by D. or made out of the whisky. The policy provided that it should be void, "if the property be sold, or transferred, or any change take place in title or possession, whether by legal process, or judicial decree, or voluntary transfer or conveyance." The loss was settled except as to the tax, where the liability was undecided. Judgment was subsequently obtained by the government, in Kentucky, on the bond, for the tax, the companies declining to defend as parties. Thompson & Co. replevined the judgment and brought suit against the companies for the amount. There was evidence tending to show that previous to the fire, Walston had

sold all his interest to Thompson, and that another brother of T. had become interested in the firm. *Held*, that it was the intention of the insurers to insure another than the proprietary interest of T. & Co. in the whisky, viz., their liability for any loss on the bond. *Held*, that this was as much an insurable interest as freights at sea, or profits in an adventure.

Firemen's Ins. Co. vs. Powell, 13 B. Mon., 321 ; *Gordon vs. Mass. Ins. Co.*, 2 Pick., 294 ; *Rohrback vs. Germania Ins. Co.*, 62 N. Y., 53.

Held, that Walston was not relieved from this liability by any sale of his interest, and the liability of the company was not affected by the policy clause, prohibiting a transfer of interest. *Held*, that the replevin bond was a satisfaction of the judgment in Kentucky, which answered the objection that the tax had not been paid, and the judgment itself, together with the refusal of the company to defend, answered the objection that the government could not collect the tax.

Germania Fire Ins. Co. et al. vs. Thompson & Co., U. S. S. C., 7 *Ins. Law Jour.*, 13.

9. H. agreed to, and did, advance to the M. S. Co., a specified amount to enable it to cultivate a farm, during the year 1876, and the company executed to him its notes for the amount advanced. As a part of the advance, he purchased and delivered to it a certain number of mules, with the agreement that they were to remain his sole property until the notes should be paid, and when paid the title to the mules should pass to the company. It was authorized to plow with them a specified amount, and if it desired to plow more might do so, paying him for the excess at current rates. He had the right to use them in plowing for himself a specified amount, he to return them to the company in as good condition as when taken by him, and if the note should not be paid at maturity he might take possession of and sell them, or so many as might be necessary, and after paying expenses of keeping and selling, should credit the remainder of the proceeds upon the notes, and if there should be any surplus, pay the same to the company. *Held*, that the company had an insurable interest in the mules.

Holbrook vs. St. Paul F. & M. Ins. Co., Minn. S. C., 25 Minn., 229 ; *Ins. Law Jour.*, 789.

10. Plaintiff was in possession of a mill, holding power of attorney from his brother, in whom was the legal title, to dispose of it in consideration of money advanced to aid in its purchase. *Held*, that this was a valid insurable interest, and where the company had knowledge of the facts it is estopped from denying it.

Wood on F. Ins., sec. 248 et seq., and 498.

Brugger vs. State Invest. and Ins. Co., U. S. C. C., Oregon, 8 Ins. Law Jour., 293.

11. An equitable title or interest of such a description that, if the property be destroyed, it will necessarily result in a loss to the insured, is an insurable interest. A party in possession of the premises, insured under a valid and subsisting contract for a conveyance, has an insurable interest, and he is not guilty of a misrepresentation or breach of warranty, so as to avoid the policy, if, in the application, he describes the property as his property, unless there is something in the policy or conditions of insurance requiring the true state of the title to be disclosed.

Columbia Ins. Co. vs. Lawrence, 2 Pet., 25; S. C. 10 id., 507; *Ætna Fire Ins. Co. vs. Tyler*, 16 Wend., 385; *Hough vs. City Ins. Co.*, 29 Conn., 10; *Ins. Co. vs. Woodruff*, 2 Dutch, 531; *Rohrbach vs. Germania Ins. Co.*, 62 N. Y., 47; *Wilbur vs. Bowditch M. & T. Ins. Co.*, 10 Cush., 446; *Brown vs. Williams*, 28 Maine, 252.

Franklin F. Ins. Co. vs. Martin, N. J. S. C. E., 40 N. J., 568; 8 *Ins. Law Jour.*, 134.

12. The vessel, when starting on her return voyage, was injured by collision, and repaired at the expense of H., the consignee. The captain drew on G. for the amount in favor of H., whom he directed to procure insurance for the protection of G. The insurance was accordingly procured by H. "on account of whom it may concern, in case of loss to be paid to their order." The insurance was "lost or not lost, * * on merchandise, to cover such risks as are indorsed on the policy." The indorsement contained, among other things, the remark, "Paid advance to cover disbursements and repairs." No inquiry was made, nor representations, as to whom H. was insuring for. In answer to a call for proof of loss and interest, after the loss of the vessel, H. furnished the underwriters' agent the protest and items of "outfit

and disbursements—among others a charge for the cost of the insurance. The agent drew on his principals for the amount, H. giving a receipt setting forth that when the draft was paid, it would be “in full for claim for total loss of advancements for disbursements and repairs,” and promising on its payment to assign all his interest in the advances, etc., to the underwriters, at the same time remarking that he had nothing to assign. When the draft was paid, H. remitted the money to G., and made the assignment, again saying he had no interest in the matter. No questions were asked of H., for whom he had insured, whether they were to be repaid, or whether any one else was interested. It does not appear what was the relation of G., or whether he had any insurable interest. Subsequently, on learning the facts, suit was brought in behalf of the insurers against H., to recover the amount paid. *Held*, that a policy like this will be applied to the interest of the parties for whom it was intended, provided it was procured with sufficient authority, or they subsequently adopted it, though they may be unknown to the underwriters.

1 Phillips Ins., sec. 383, 384.

It is sufficient if an insurable interest subsisted during the risk, and at the time of loss, whether at the time of effecting the insurance or not.

1 Perkins's Arnould, 238; Worthington vs. Bearse and others, 12 Allen, 384.

Right of property is not essential to an insurable interest; injury from its loss, or benefit from its preservation, may be sufficient.

Lucena vs. Robinson, 2 Bos. & Pull., 295; S. C., 5 id., 295; Buck & Hedrick vs. Ins. Co., 1 Pet., 163; Hancox vs. Ins. Co., 3 Sumner, 142.

Where money is advanced, as in this case, the lender has a lien on the vessel, but not the cargo; but if the owner of the cargo agrees that he shall be paid from the cargo, and a bill of lading is furnished, he has a lien on the latter which may be protected by insurance, and where such liens subsist, a third party may pay the debt, and, with consent of debtor and creditor, be substituted for the latter. Where there is neither agreement nor assignment, there can be no subrogation unless there has been a compulsory payment by the party claiming to be subrogated.

Ins. Co. vs. Barings, 20 Wall., 163, and the authorities there cited. Clark

vs. Mauran, 3 Paige, 373 ; Dows vs. Greene, 24 N. Y., 638 ; Holbrook vs. Wright, 24 Wend., 169 ; Chandler vs. Belden, 18 J. R., 162 ; The Hull of a New Ship, 2 Ware, 203 ; Pattison vs. Hull, 9 Cow., 747 ; Langdon vs. Bull, 9 Wend., 84 ; Dixon on Subrogation, 163 ; Garrison vs. Ins. Co., 19 How., 312 ; The Cabot, 1 Ab., 150 ; Sanford vs. McLean, 3 Paige, 122.

Held, that in the absence of inquiry, H. was under no obligation to disclose the full facts to the underwriters ; his silence was no imputation of bad faith, and there is no ground on which he can be called to refund the insurance money.

1 Pet., 160.

Held, that the burden of proof was on plaintiffs to show that G. had no insurable interest.

1 Greenl. Ev., secs. 34, 35, 80, 81 and notes.

Held, that even if G. had no insurable interest, the underwriters were guilty of laches, and H. having parted with the money in good faith, cannot be compelled to repay it.

1 Waite's Actions and Defenses, 252, 255.

Hooper vs. Robinson & Cox, U. S. S. C., 8 Otto, 528 ; 8 Ins. Law Jour., 49.

13. It is a settled question that in an action on a valued policy of insurance, the plaintiff is not put on proof of his interest in the object insured by a plea of the general issue. In this case, however, the evidence shows that the plaintiffs had an insurable interest in the stock of goods belonging to Marks, on which they took a fire policy. They furnished Marks with goods, and upon their credit and responsibility enabled him to obtain goods from others, and subsequently paid for them. The plaintiffs' sole reliance, it seems, for payment, rested upon the fidelity and success of Marks' business. The danger of loss by the destruction of the store and Marks' stock of goods on hand, constitutes a sufficient interest in the plaintiff to sustain the policy. The plea that the policy became void by the plaintiff's taking insurance on the same property in another company without notice to defendants is not tenable. The other insurance taken on the property was in the interest of a different party.

Roos & Co., vs. Merch. Mut. Ins. Co., La. S. C., 27 La., 409.

14. The bargainee of goods who has advanced the price thereof to the seller, when the seller has agreed to store them free of

expense to him, and deliver them as wanted, and to procure insurance on them to protect his advances, and does so in good faith, in the name of the bargainee, making known to the agent of the insurance company the fact of the advances, and the object of the policy, has an insurable interest in the goods; so that a policy in his name may be valid and binding, so far as that point is concerned, notwithstanding the goods may not have been separated from other stock belonging to the seller, of the same kind, or weighed out, formally delivered and accepted by the bargainee.

Cumberland Bone Co. vs. Andes Ins. Co., Me. S. J. C., 64 Me., 466.

15. An interest in property insured which was slight or contingent, legal or equitable, but which was so represented at the time the contract was made, is sufficient to sustain the same, and to authorize a recovery in case of loss.

Fenn vs. N. O. Mut. Ins. Co., Ga. S. C., 53 Ga. R., 578.

16. The defense that plaintiff has violated in some particular, the policy of insurance sued on, must be proved by the defendant. A wife holding property in her own name, donated to her by her father, during marriage, has an insurable interest in it.

Breard vs. Merch. & T. Ins. Co., La. S. C., 29 La., 764.

17. Where property of a married woman is leased for a term of years by her husband to another, both the wife and the lessee have an insurable interest in the demised premises. Where a mortgagee insures property, the mortgagor, having no connection with it, cannot claim its benefit, but the mortgagee may receive and enjoy the insurance money, and still collect the mortgage debt of the mortgagor.

Ely vs. Ely, Ill. S. C., 80 Ill. R., 532.

18. An oral agreement for the purchase of a vessel was made by insured, and the insurance was effected on the same day for a specified voyage. The agreement was not reduced to writing until two days later, but was subsequently carried out and the vessel proceeding on the voyage was lost. *Held*, that the oral contract was not void or illegal by reason of the statute of frauds

which affects the remedy only as between the parties, and where carried out the contract is unaffected by the statute, and is to be regarded as valid between other parties for other purposes. *Held*, that the assured had a valid insurable interest at the time of the insurance.

Townsend vs. Hargrave, 118 Mass., 19; *Stone vs. Denison*, 13 Pick., 1; *Eastern Railroad vs. Relief Ins. Co.*, 98 Mass., 420; *Distinguishing Stockdale vs. Dunlap*, 6 M. & H., 24.

Amsinck et al. vs. American Ins. Co. et al., Mass. S. J. C., 129 Mass., 185; 9 *Ins. Law Jour.*, 581.

19. Plaintiffs, merchants of London, in the regular course of business, were notified by their correspondent at Bombay, of a shipment of 250 bales of cotton, with request to insure, and notice of a draft at six months' sight for £3,000 against the same, with shipping documents attached. The cotton was duly insured for £5,000, under two open policies held by plaintiffs in the defendant company, "as well in their own names, as for and in the name or names of all and every person and persons to whom the same doth, may or shall appertain, in part or in all." The draft was cashed by the National Bank of India, and by it transmitted to its manager in London for collection, and accepted by the plaintiffs, "against delivery of shipping documents" for the cotton. The plaintiffs also agreed to hold the amount insured at the disposal of the bank until payment of their acceptance. The vessel on which the cotton was shipped, was lost at sea before the maturity of the draft, and the plaintiffs paid the same at maturity, and sued for the amount of the insurance, claiming that they had the whole legal interest; that they were bound as consignees to receive and account for the whole proceeds of the cotton, and therefore were equally entitled to receive, and bound to account for the sum assessed by them thereon; claimed in defense, that the plaintiffs had no insurable interest in the cotton, but a mere expectancy, resting on a contingency: that if they had such interest it was limited to the amount of the bill they had accepted, and they had no right to insure for any but themselves or any interest except their own. *Held*, that plaintiffs were entitled to recover for the amount of their advance or acceptance.

Ebsworth vs. Alliance Marine Ins. Co., Eng. C. P., 4 *Ins. Law Jour.*, 399.

WHAT IS NOT VALID.

20. Insurance was effected on a vessel in which he had no interest, by the master, in his own name, the company supposing him the owner. Three-fourths was owned by his wife. A libel was filed by the company to secure a lien for the unpaid premium. *Held*, that the husband, as master of the vessel, had no authority to make the insurance in his own name; that the husband of the wife had no insurable interest in the wife's interest in the vessel, so as to create a lien upon the vessel for the premium; that the insurance and policy being in the name of the master alone, and not "for the interest of all concerned," the company was only liable, if liable at all, to him, and not to the owners of the vessel in case of loss; and he having no insurable interest in the vessel, the policy could not be enforced against the libelants in case of a loss; that where the policy itself was such as could be enforced by the owner of the vessel, the insurance thereof created no lien on the same for the premium agreed to be paid.

Mercantile Ins. Co. vs. Schooner Orphan Boy, U. S. D. C., N. D. Ohio, 7 Ins. Law Jour., 717.

21. Conveyance by insured before insurance, but litigating to set aside deed, and litigation terminated against him before loss, cannot recover on basis of entire value. To authorize recovery on basis of liability for mere profits, or of value of possession, or of right thereto until ouster, there must be evidence of such liability or of value.

Monroe vs. Southern Mut. Ins. Co., Ga. S. C., 63 Ga., 669.

22. The plaintiff contracted with merchants at Calcutta for the purchase of a cargo of rice, in the following terms: "Bought for account of A. of B. & Co., the cargo of new crop Rangoon rice per *Sunbeam*, 707 tons register, at 9s. 1½d. per cwt. cost and freight expected to be March shipment, but contract to be void should vessel not arrive at Rangoon before April, 1871. Payment by seller's draft on purchasers at six months' sight with documents attached." The *Sunbeam* did not belong to either the purchaser or seller of the rice, but was chartered by the sellers' agents to proceed to Rangoon, to load a cargo of rice, and convey

it to any port in the United Kingdom. On the day after making the contract of purchase, the plaintiff insured the rice at and from Rangoon to the United Kingdom for the sum of £5,500. The *Sunbeam* arrived at Rangoon on the 3d of March, anchored at the spot usual for such vessels. By the 30th of March the ship was almost entirely loaded, when all at once it filled with water and sank.

Held, that while the cargo was incomplete the plaintiff had no risk and no insurable interest.

Anderson vs. Morice, Eng. House of Lords, L. R., 1 App. Cas., 713.

EXTENT OF, AND LEGAL RIGHTS FLOWING FROM.

23. Interest need not be more specifically stated in the complaint than in the policy. The complaint should allege the interest but not necessarily the ownership.

Aurora F. Ins. Co. vs. Johnson, Ind. S. C., 3 Ins. Law Jour., 907.

24. Where, in an action upon a policy of insurance, it appears from the petition that the insurance company, for a specified premium, executed and delivered a policy insuring A. against loss by fire, on specific property occupied by the insured, an insurable interest in the insured, under the code, is sufficiently shown.

People's Fire Ins. Co. vs. Heart, Ohio S. C., 24 O., 331; 4 Ins. Law Jour., 246.

25. One of two or more joint owners, or owners in common, of property, may insure his interest separately against loss by fire, and in case of loss is entitled to recover and retain the insurance. Plaintiff having a lien upon certain premises, entered into an arrangement with other incumbrancers, among them the defendant C., that C. should bid off the premises on a foreclosure sale for the benefit of the parties to the arrangement. C. accordingly became the purchaser, and thereafter executed a declaration of trust, declaring, among other things, that the purchase was for the benefit of plaintiff to the extent of his lien; that C. was to manage the property for the benefit of all, and ultimately to

sell and divide the proceeds. C. having refused, when requested by plaintiff, to insure the property to an amount desired by him, he procured certain policies of insurance in the name of C. as the insured, but loss payable to plaintiff "as his interest may appear," he paid the premium. A loss occurred. In an action to determine who was entitled to the insurance money, *Held*, that the plaintiff had an insurable interest, and only that interest was covered by the policies; that C. had no right to the money in law or equity, and that the fact that plaintiff had an interest in common with others in the preservation of the property, did not, under any principles of public policy, prevent him from insuring his interest separately, or require him to turn over the moneys to the trustee. The rule prohibiting one standing in the same relation with others to the property, or standing in a fiduciary relation with others, from taking a title or advantage to their prejudice, has no application to such case.

Harvey vs. Cherry, N. Y. C. A., 76 N. Y., 436.

26. A part owner of a vessel in whose name a policy of insurance on the whole vessel for account of the owners, is issued, becomes a trustee for all the owners, and in case of loss may sue on the policy in his own name alone. Such part owner has no authority, by reason of the joint ownership, to insure the interest of the other owners; hence a policy taken upon the whole vessel in his own name, without previous authority or subsequent ratification by the other owners, is invalid, except as to the interest of the part owner obtaining it. Where such policy was intended by the insurer to cover the whole vessel for the benefit of all concerned, but is invalid except as to the interest of the part owner procuring it, the insurer is only liable to such part owner for such portion of the sum insured as his interest bears to the whole. Where a policy of insurance contains a condition of avoidance on account of additional or over-insurance, such policy is not avoided by a contract for additional insurance, where it is shown that such contract is invalid as to all excessive insurance. The E. company insured a boat for \$3,000 against fire, on account of the owners, loss payable to the insured. The policy provided that it should be void "if any farther insurance has been or shall be made,

which, together with this insurance, shall exceed the sum of six thousand dollars." The policy was taken in the name of K. under authority of the owners. Subsequently three of the owners sold their interest, amounting to three-fifths, to G., who thereupon without the knowledge or consent of the other two owners insured the boat in his own name for the benefit of those concerned in the L. company for \$4,500, the vessel being valued in the application at \$6,000. K., upon learning of the sale, procured the indorsement of the secretary upon the first policy, "for account of present owners," without the knowledge or consent of G. The boat was a total loss. The L. company paid in full. The E. company then paid \$1,500 but refused to pay more. The act of G. was never subsequently ratified by the other owners. In a subsequent action brought by K. against the E. company, *Held*, that there was only valid insurance in the L. company for \$2,700, representing G.'s interest, and the voluntary payment of more did not affect the question. *Held*, that in determining the liability of the E. company other insurance must be limited to \$2,700. *Held*, that if the indorsement procured by K. was subsequently ratified by G., K. might recover the balance of \$1,800 for his benefit, otherwise he had no remaining right of action.

Knight vs. Eureka Fire and Marine Ins. Co., Ohio S. C., 6 Ins. Law Jour., 66.

27. A. sold the property to B., the consideration being a judgment for \$4,500 which was entered up, and a judgment for \$3,000 which it was agreed should not be entered up. The property was sold, subject to a mortgage for \$2,500. A. afterwards transferred the \$4,500 judgment to C., and became security to her for its payment. Afterwards, at A.'s request, B. insured the barn, and assigned the policy to A. as collateral security for the payment of money loaned on the property. A. paid the premium. The property was burned, and A. refused to apply the insurance money to the reduction of the \$3,000 judgment, as B. requested. *Held*, that the assignment was intended as security for the \$4,500 judgment. A. had an insurable interest in his liability to C.; therefore, the proceeds could not be set off by B. to a claim on the \$3,000 judgment.

Caley vs. Hoopes, Pa. S. C.

28. The defendant A. held the title of the Grand Hotel premises at Saratoga Springs in trust for plaintiff H. and a large number of other *cestuis que trust*. The buildings on this property were insured to A. for \$151,000, \$45,000 of which was payable to one C., a mortgagee; \$15,000 was insured in the name of A., and made payable to H. as his interest may appear. It was conceded on the trial that the interest of H. insured was such interest as he had under the trust deed. The balance of the insurance, \$91,000, was payable to A. It appears of this insurance that A. collected only \$43,834.14. That \$9,753.64 was collected on the policies made payable to H. It further appears that the real estate owned by A., as trustee in question, has been sold under prior mortgages for less than the amount of the mortgages, and that A. has been and will be unable to pay back to the *cestuis que trust* any of their advances. The *cestuis que trust* interested in the property, through A. as trustee, including H., represent the amount of \$83,000, H.'s being \$15,000. The premiums on the policies payable to plaintiff were paid by H.

By arrangement between plaintiff and defendant, the property which defendant held in trust for a large number of *cestuis que trust*, was insured for the benefit of one *cestui que trust*, who paid the premium for such insurance; no notice of such arrangement to the other *cestuis que trust* being claimed. If this arrangement be valid H. receives about \$10,000, and the other *cestuis que trust* receive nothing. *Held*, that plaintiff had an insurable interest and a right of action in his own name on the policies payable to him. He was entitled to recover the amount of his loss within the insurance. Insurance paid for by him for his own benefit, did not inure to the benefit of others having a like insurable interest.

Harvey vs. Cherry et al., N. Y. S. C., 7 Ins. Law Jour., 315.

29. Goods were shipped by E. through an agent of G. to Bergen, there to be delivered and held for G., who was to sell the goods and pay the debts owed by E., to various persons among whom was the plaintiff, L. G. found it impossible to effect an insurance in Copenhagen, and accordingly insured the goods by the policy in question through insurance brokers in London. G.'s

intention was either to sell the goods through his agent in Bergen, or reship them to Liverpool to the plaintiff, a correspondent of his, for sale on his account, but before the goods reached Bergen they were lost. *Held*, that L. had an insurable interest, but that G. also had an interest which should have been alleged, the averment of L. being that he was interested to the extent of the amount insured. *Held*, that L. could not sue alone on the policy.

Howe vs. Cumming, Liverpool (Eng.) Circuit Court.

30. Interest in whisky, through liability to pay the government tax, as guarantors on a bond, is insurable and may be recovered under policy including such tax in its terms.

Ins. Co. vs. Thompson, U. S. S. C., 5 Otto, 547.

31. Owner of equity of redemption has an insurable interest equal to the value of the building. A party having a mechanics' lien, has an insurable interest limited by the amount of his claims and their value.

Ins. Co. vs. Stinson, U. S. S. C., 13 Otto, 25.

See Cross Index for other cases bearing on INSURABLE INTEREST.

INSURANCE.

DIGEST OF RECENT CASES.

INSURANCE—LEGAL NATURE OF.

1. Issuing a policy of insurance is not commerce, and Canadian Provincial legislation on that subject is not *ultra vires*.

Parrons vs. Citizens' Ins. Co. et al., Ont. C. A., affirmed by Can. S. C.

See Cross Index for other cases bearing on INSURANCE.

INTERMEDIATE INSURANCE.

DIGEST OF RECENT CASES.

1. The company's charter provided that every contract, bargain, agreement and policy for the purpose of insuring against fire, should be in writing or in print, under the seal of the corporation, signed and attested by its officers. *Held*, that this provision refers simply to the final formal contracts by which the company is bound, and does not invalidate such initial and preliminary contracts to insure as may be made by the company or its authorized agents, though not in writing.

Constant vs. Ins. Co., 3 Wallace C. C., 316, distinguished. *Security Fire Ins. Co. vs. Ky. M. & F. Ins. Co.*, 7 Bush, 81.

Held, that credit given by agent according to usage did not affect the validity of the contract, which could be enforced in a court of equity. An agent might after a fire fill up a policy in accordance with a previous parol agreement, and such policy would bind the company. *Held*, that such policy was the property of the insured, and could be recovered on though retained by the agent.

Franklin Fire Ins. Co. vs. Colt, U. S. S. C., 4 Ins. Law Jour., 367.

2. A certificate of contract for present insurance and for a policy on the risk, was surrendered by the insured on the delivery, by an agent, of policies obtained from his own company, and by it from other offices insuring the property. The latter policies were void by reason of the company procuring them failing to notify the insurers of other insurance. *Held*, that where the delivery of a void policy is the sole consideration for the release of a liability, the release may be avoided without returning or offering to return the policy of the debtor. Where the charter authorizes a company "generally to do and perform all things relative to the object of the association," and further provides that "all policies or contracts of insurance" shall be subscribed by the officer designated for that purpose by the directors, the

latter proviso does not disable the company from binding itself by contracts for policies and intermediate insurance executed in other modes and by other agents, but merely prescribes the manner in which the final contract or policy shall be issued.

Dayton Ins. Co. vs. Kelly, Ohio S. C., 4 Law Ins. Jour., 169.

See Cross Index for other cases bearing on INTERMEDIATE INSURANCE.

INTEREST.

1. After the policy becomes due it is proper for the jury in fixing the amount of the verdict to allow interest.

Peoria Marine and Fire Ins. Co. vs. Lewis, 18 Ill., 553.

Knickerbocker Ins. Co. vs. Gould, Ill. S. C., 5 Ins. Law Jour., 786.

2. Where a policy of insurance stipulates for payment of losses sixty days after adjustment, and the assurers make reasonable efforts to effect an adjustment, they will not be liable for interest from the expiration of the sixty days, but only from judicial demand.

Gebtworth et ux. vs. Teutonia Ins. Co., La. S. C., 29 La., 30.

See Cross Index for other cases bearing on INTEREST.

INVASION.

SEE RIOT, WAR.

See Cross Index at end of volume, for cases bearing on INVASION.

INVOICES.

SEE PROOFS OF LOSS.

See Cross Index at end of volume, for cases bearing on INVOICES.

JURISDICTION.

DIGEST OF RECENT CASES.

JURISDICTION—WHEN THE COURT HAS.

1. A citizen of New York is authorized under the laws of the State to commence an action in certain State courts against a fire insurance company of another country, by service of summons or summons and complaint, without requiring other process to be issued then or afterward for commencing or maintaining it.

McQueen vs. Merrimac Mfg. Co., 16 J. R., 5; 5 Ed. St., 742; 2 R. S., 450, § 15-30; 2 Selden Pr., 477, 536, 644; 20 Viner Ab., 42; Kerr on Act. at Law, 145; *Lynch vs. Mech. Bk.*, 13 J. R., 127; *Ely vs. Holton*, 15 N. Y., 595; *Hartung vs. The People*, 26 N. Y., 167-172. Cases of *Tuttle vs. Smith*, 14 How., 395; *Cobb vs. Durkin*, 19 How., 164, distinguished.

Such courts have thereupon such jurisdiction of the matter and of the defendant, as that they can render a personal judgment which will be valid in the State, and enforceable against any property of the defendant found within it.

Story on Confl. of Laws, § 539, 541. Cases of *Shumway vs. Sullivan*, 6 Wend., 447, and cases cited; *Ferguson vs. Moton*, 11 Ad. & El., 38; *Smith vs. Nicolls*, 5 Bing. (N. Y.), 208; *Fisher vs. Lane*, 3 Wilson, 297; *Bodertha vs. Goodrich*, 3 Gray, 508, distinguished. Same Case, 2 W. Blackstone, 834; *Curran vs. Stewart*, 1 Stark, N. P. R., 200; *Douglas vs. Forrest*, 4 Bing., 686; *Martin vs. Nicolls*, 3 Simmons, 458; *Becquet vs. MacCarthy*, 2 Barn. & Ad., 951; *Don vs. Lippman*, 5 Cl. & Finn., 1; *Hope vs. Hope*, 4 De Gex, McN. & G., 328; *Hobhouse vs. Courtney*, 12 Simons, 140; Eng. Ch. R., v. 35, page 119; Kerr on Act. at Law, chapter 4, page 175; *Thompson vs. Emmett*, 4 McLean, 96; Cases of *McCormick vs. Penn. C. R. R.*, 49 N. Y., 303; *People vs. Central R. R. of N. J.*, 42 N. Y., 283; *Schwinger vs. Hickox*, 53 N. Y., 230; *Hope vs. Mut. Ins. Co.*, 4 How. P. R., 275, distinguished. *Lafayette Ins. Co. vs. French*, 18 How., N. S., 404.

Gibbs vs. Queen Fire Ins. Co., N. Y. C. A., 63 N. Y., 114; 5 *Ins. Law Jour.*, 225.

2. The legislature of Wisconsin enacted that if any foreign insurance company should transfer a suit brought against it from the State to the Federal courts, it should be the duty of the Secre-

tary of State to revoke and cancel its license to do business within the State. The C. company removed a suit in violation of such an agreement, and procured an injunction restraining the Secretary of State from revoking its license. *Held*, that an agreement to abstain from resorting to Federal courts is void as against public policy, and the statute is in conflict with the constitution of the U. S., and void.

Home Ins. Co. vs. Morse, 20 Wall., 445.

But a State has the right to impose conditions to the transaction of business within its limits by an insurance company chartered by another State, which are not in conflict with the laws or Constitution of the United States.

Paul vs. Virginia, 8 Wall., 163; *Ducat vs. Chicago*, 10 Wall., 410; *Lafayette Ins. Co. vs. French*, 18 How., 494; 13 Pet., R. 519; *Bank of Augusta vs. Earle*, 13 Pet., 586.

It has the right to entirely exclude such corporation from its territory, or, having a license, to revoke it at discretion, in the absence of an explicit contract to the contrary.

Rector vs. Philadelphia, 24 How., 300; *People vs. Roper*, 55 N. Y., 629; *People vs. Commissioners*, 47 N. Y., 50; *Humphrey vs. Pegues*, 16 Wall.; *Tomlinson vs. Jessup*, 15 ib., 454.

The motive of the State in doing so is not open to inquiry. The company has no constitutional right to transact its business there, and its exclusion violates no constitutional right. The act complained of must be illegal to make it a subject of judicial inquiry.

Crandall vs. Nevada, 6 Wall., 35; *Almy vs. State of California*, 24 How., 169; *Brown vs. State of Md.*, 12 Wheat., 419; *Henderson vs. Mayor of New York*, 92 U. S. R., 265; 7 How., 572.

Held, that a State has the power to judge of the cases and determine for what cases and in what manner the license shall be revoked, and may compel the foreign company to abstain from the Federal courts or cease to do business within its territory. *Held*, that the injunction cannot be sustained.

Doyle vs. Continental Ins. Co., U. S. S. C., 6 *Ins. Law Jour.*, 177.

3. A non-resident of Maryland may sue a foreign corporation in the courts of that State after it has withdrawn from the State,

in case of a policy issued in the State, on property situated within the State.

Ben Franklin Ins. Co. vs. Gillett, Md. C. A., 9 Ins. Law Jour., 774.

WHEN THE COURT DOES NOT HAVE.

4. In an action upon a money demand, where the general issue is pleaded, the amount of the debt claimed, and not merely the damages alleged or the prayer for judgment at its conclusion must be considered in determining whether the U. S. S. C. can take jurisdiction.

Lee vs. Watson, 1 Wall., 339.

An action upon a policy for \$1,400 where only that amount can be recovered, though damages are laid at \$3,000, will not give the court jurisdiction where the limit was fixed at \$2,000.

Shacker vs. Hartford Fire Ins. Co., U. S. S. C., 6 Ins. Law Jour., 319.

5. Where the policy of an English company upon the property of a citizen of Louisiana, situated therein, was assigned after a loss to a citizen of Maryland; *Held*, that a suit for recovery cannot be maintained in a Maryland court, although the company is doing business in that State.

Hurst, Purnell & Co. vs. L. L. & G. Ins. Co., Balt. Md. Superior Ct.

See Cross Index at end of volume, for other cases bearing on JURISDICTION.

KEEPING AND STORING.

ABSTRACT OF THE LAW.

a. A prohibition against keeping or storing is not usually violated by the presence of the prohibited article in such limited quantity as was not within the apparent intention of the parties, or in such altered shape or for such a limited time as would not naturally suggest the fact of a violation.

Hynds vs. Schenectady Co. Mutual Ins. Co., 11 N. Y., 554; Ins. Co. vs. Slaughter, 12 Wall., 464; Williams vs. Firemen's Fund Ins. Co., 54 N. Y., 569; Rafferty vs. Ins. Co., 18 N. J., 480; Morse vs. Buffalo F. & M. Ins. Co., 30 Wis., 534; Leggett vs. Aetna Ins. Co., 10 Rich., 202; Wood vs. N. W. Ins. Co., 46 N. Y., 421; Langdon vs. Equitable Ins. Co., 6 Wend., 622.

b. But a substantial keeping in plain violation of the contract will work a forfeiture in the absence of waiver, or of such usage as must be presumed to have been within the contemplation of the parties, and to have been excepted from the prohibition.

Pindar vs. Continental Ins. Co., 38 N. Y., 364; *Whitmarsh vs. Charter Oak Ins. Co.*, 2 Allen, 581; *Richards vs. Protection Ins. Co.*, 30 Me., 273; *Cerf vs. Home Ins. Co.*, 44 Cal., 320; *Westfall vs. Hudson River F. Ins. Co.*, 13 N. Y., 289.

See further on this subject under **POLICY, PROHIBITED RISKS, REPRESENTATION, RISK, WARRANTY, USE.**

See Cross Index at end of volume, for cases bearing on **KEEPING AND STORING.**

KEROSENE.

See **KEEPING AND STORING, POLICY, PROHIBITED RISKS, RISK.**

See Cross Index at end of volume, for cases bearing on **KEROSENE.**

LANDLORD AND TENANT.

ABSTRACT OF THE LAW.

a. The tenant when liable has an insurable interest to the extent of his liability, and the tenant for the term to the value of his interest.

Mayor of N. Y. vs. Hamilton Ins. Co., 10 Bos. (N. Y.), 537.

b. The tenant who erects buildings with a right to their removal, may insure as his own.

Hope Ins. Co. vs. Brolensky, 35 Penn. St., 282.

c. A change of tenants, irrespective of their character, will not avoid the policy.

Gates vs. Madison Co. Mut. Ins. Co., 2 N. Y., 43; *Cumberland Valley Mut. Prot. Co. vs. Douglass*, 8 P. F. Smith, 419.

d. Where the policy stipulates that a violation shall work a forfeiture, irrespective of the parties, a violation by any party will usually be within the proviso, but where it appears either from the language or character of the

prohibition, that the act must be that of the insured or within his power to prevent, violations by a tenant or lessee, unauthorized or unknown by the insured, will not work a forfeiture.

Hall vs. People's Mut. F. Ins. Co., 6 Gray (Mass.), 185; *Fire Ass. of Phila. vs. Williamson*, 26 Penn. St., 196; *Worcester vs. Ins. Co.*, 9 Gray (Mass.), 27; *Kelly vs. Ins. Co.*, 97 Mass., 284; *Mead vs. N. W. Ins. Co.*, 14 N. Y., 533; *Hoxie vs. Prov. Ins. Co.*, 6 R. L., 517.

DIGEST OF RECENT CASES.

LANDLORD AND TENANT—LIABILITY OF, FOR LOSS.

1. A bill was filed by Edward Ely, the appellant, for the purpose of obtaining the benefit of the insurance upon the premises of which he was the tenant. David Ely, one of the appellees, leased the premises to appellant, the lease containing covenants on the part of the lessee that he had received the premises in good order and condition; that he would keep them in repair at his own expense, and at the end of the term would deliver the same up to his lessor in as good order and condition as when they were entered upon by him. The title to the property was in Mrs. Ely, wife of David, who in her own name had procured policies of insurance on the building upon the premises leased. The building was destroyed by fire, and a new one erected by the tenant. *Held*, under the covenants in the lease, that the tenant must sustain the whole expense of rebuilding; that a court of equity could not impose upon the owner a portion of such cost; that the insurance money was as much the money of Mrs. Ely as that derived from any other source; that a tenant has no equity to compel his landlord to expend money received from an insurance office in rebuilding the premises destroyed, or to restrain the landlord from suing for the rent until the premises are rebuilt.

Ely vs. Ely, S. C. Ill., 5 Ins. Law Jour., 799.

2. A lessee is not responsible for demised property accidentally consumed by fire, unless by his covenant he has made himself so. A covenant to "redeliver or restore the property in the same condition or plight," or other words of like import, do not bind the tenant to rebuild, in case of casual consumption by fire. Such

covenant amounts to an agreement to take ordinary, reasonable care of the property, according to its nature, and to surrender possession at the expiration of the term. But a covenant to "repair" generally, or to "uphold and repair," imposes the loss (by casualty) on the tenant.

Fowler and Morse vs. Payne, 49 Miss. R.; *Leavitt vs. Fletcher*, 10 Allen, 119; *Abby vs. Billups*, 35 Miss. R., 630; *Co. vs. Pritchard*, 6 Term R., 750; *Maggott vs. Heansberger*, 8 Leigh, 536; *Harris vs. Nicholas*, 5 Minn.; *Nase vs. Berry*, 22 Ala., 393; *Phillips vs. Stephen*, 16 Mass., 238; *Warner vs. Hitchens*, 5 Barb., 667; *McIntosh vs. Lowe*, 49 Barb., 554; *Wainscott vs. Silvers*, 13 Ind., 300.

Levy vs. Dyers, *Miss. S. C.*, 5 *Ins. Law Jour.*, 799.

3. Insurance was effected by the landlord against fire and explosion, and damages were paid for an explosion under the impression of both parties that the landlord had bound himself to so do in his lease. It was afterwards found that the tenants were liable to make good such damage, and they had done so upon the demand of the landlord, after recovering damages from the city through whose fault the explosion occurred. *Held*, in the absence of any specific agreement in the policy restricting the loss to such sum as the insured himself might be damaged, the company could not recover the amount paid.

Darrell vs. Tibbills, *Eng. High Court of Justice*.

See Cross Index for other cases bearing on LANDLORD AND TENANT.

LESSOR AND LESSEE.

See LANDLORD AND TENANT.

See Cross Index for cases bearing on LESSOR AND LESSEE.

LEX LOCI.

ABSTRACT OF THE LAW.

a. The general doctrine is, that the place of contract is that at which the instrument or agreement became fully consummated and binding upon both parties. Where the policy is issued complete from the home office, and the act of the agent is purely ministerial in its delivery, the former is the place of contract, but where some further act of the agent or insured is essential to its validity, the place where such act is performed is the place of contract. The *lex loci* of an assignment may be different from that of the policy, nor has the act of countersigning been held in all cases decisive.

Daniels vs. Hudson River, F. Ins. Co., 12 Cush. (Mass.), 416; *Hyde vs. Goodnow*, 3 Comst. (N. Y.), 256; *Huntley vs. Merrill*, 32 Barb. (N. Y.), 626; *Whitcomb vs. Ins. Co.*, 8 Ins. Law Jour., 624; *Newcomb vs. Ins. Co.*, 9 Ins. Law Jour., 124.

DIGEST OF RECENT CASES.

LEX LOCI—PRINCIPLES CONTROLLING.

1. The contract of insurance is personal and not real. It is not operative on the estate, but merely an agreement to pay money in a certain contingency. Neither the fact that the contingency is on Michigan property nor that the insured is a corporation of that state, makes Michigan the place of performance, so as to determine the policy of a company of another State to be a Michigan contract.

Clay Fire and Mar. Ins. Co., vs. Huron Salt and Lumber Mfg. Co., Mich. S. C., 31 Mich., 346; 4 Ins. Law Jour., 858.

2. Contracts made by the insurance company of a State, in that State, and to be performed there, relating to property in another State, are to be governed by the laws of the first State.

Merch. and Manf. Ins. Co., vs. Linchey, St. Louis, Mo., C. A.

3. Application was made in New Jersey to the resident agent there of a Pennsylvania company for insurance on property in

New Jersey. The application was taken to the company's office in Pa., there approved and a policy mailed to the insured. *Held*, that the contract was made in Pa., where the last act necessary to its validity was performed, when no mutual act remained to be done to entitle either party to enforce it; *Held*, that it would be enforced by comity in New Jersey, although the agent had not complied with the statutory requirements.

Northampton Mut. Live Stock Ins. Co. vs. Tuttle, N. J. S. C.

4. A policy not valid until countersigned by the agent, is governed by the law of the State where such agent countersigned. If by the laws of that State the insurance on personalty was avoided by misrepresentations as to the realty, the whole policy was void, although the insurance as to the personalty would be valid in the State where the insurer was domiciled.

Todd vs. State Ins. Co. of Mo., Phila., Pa., C. P.

See Cross Index for other cases bearing on LEX LOCI.

LIBEL.

DIGEST OF RECENT CASES.

1. In a libel by the insurer who has paid the loss to the insured, against the carrier by whose wrongful act the loss occurred, the respondent is not permitted to set up as a defense, that the insurer was not legally bound to indemnify the assured for the loss sustained by such wrongful act. Such libel is properly filed in the name of the insurer, and it is not necessary nor proper in admiralty that the action be brought in the name of the assured for the use of the insurer.

Citing *Propeller Monticello vs. Mollison*, 17 How. Pr., 152; *The Manistee*, 5 Biss., 381; *Ins. Co. vs. C. D., Jr.*, 1 Woods, 72; *Hall & Long vs. R. R. Co.*, 13 Wall., 367.

The Amazon Ins. Co. vs. the Steamboat Iron Mountain, and Barge Ironsides, U. S. D. C., S. D. Ohio, 6 Ins. Law Jour., 156.

2. The underwriter of a ship has a lien for the premiums due upon marine policies, and is entitled to payment from the proceeds of sale. The libel or petition should aver not only the dates and amounts of the policies, but the names of the parties insured, and the character and extent of their several interests in the vessel.

The Dolphin, U. S. D. C., E. D. Mich., 5 Ins. Law Jour., 931.

See Cross Index for other cases bearing on LIBEL.

LIEN.

See INCUMBRANCE, MORTGAGE, TITLE.

See Cross Index for cases bearing on LIEN.

LIGHTNING.

ABSTRACT OF THE LAW.

a. Under the ordinary fire contract, there is no liability for a loss occasioned by lightning unless fire ensues.

Andrews vs. Union Mutual Ins. Co., 37 Me., 256; Babcock vs. Montgomery County Ins. Co., 6 Barb., 637; Kenniston vs. Ins. Co., 14 N. H., 341.

DIGEST OF RECENT CASES.

LIGHTNING.

1. Where a lightning-rod dealer, upon a sale of a lightning-rod, contracted and agreed to pay all damages resulting to the building upon which the same was erected, within a given time, from lightning: *Held*, that such agreement was a contract of guaranty,

and not insurance; and it was not necessary, to the validity of the note given therefor, that such dealer, a non-resident, should have complied with the statutes in regard to foreign insurance companies.

Cook vs. Wierman, 51 Iowa, 561.

Cole Bros. et al. vs. Haven, Iowa S. C., 10 Ins. Law Jour., 156.

See Cross Index at end of volume, for other cases bearing on LIGHTNING.

LIMITATION.

ABSTRACT OF THE LAW.

a. The limitation clause is valid and will be enforced by the courts.

Ripley vs. Aetna Ins. Co., 29 Barb. (N. Y.), 532; *Brown vs. Hartford Ins. Co.*, 5 R. I., 394; *Ames vs. N. Y. Ins. Co.*, 14 N. Y., 253.

b. The limitation usually begins to run from the time when the loss by the terms of the contract accrued or became payable.

Mayor of N. Y. vs. Hamilton Ins. Co., 39 N. Y., 45.

c. But if the parties distinctly stipulate that the limitation shall begin to run from the time of loss, it may be sustained accordingly.

Carraway vs. Merchants' Mut. Ins. Co., 26 La. An., 298; *Provincial Ins. Co. vs. Aetna Ins. Co.*, 16 U. C. Q. B., 135.

d. Suit instituted before the loss is payable, is premature.

Riddlesbarger vs. Hartford Ins. Co., 8 Bos. (N. Y.), 495.

e. Action begun after the limitation has expired, will be sustained when it could not have been earlier brought.

Longhurst vs. Star Ins. Co., 19 Iowa, 364; *Semmes vs. City Fire Ins. Co.*, 13 Wall. (U. S.), 158.

f. The limitation clause will not be enforced against parol contracts.

Penly vs. Beacon Ins. Co., 7 Grant's C. H., 180.

g. Any action on the part of the insurer which justifies the insured in delaying the suit, is a waiver of the limitation clause; so also is insolvency of the company.

Peoria Ins. Co. vs. Hull, 12 Mich., 202; *Curtis vs. Home Ins. Co.*, 1 Biss., 485; *Ripley vs. Astor Ins. Co.*, 17 How. Pr. (N. Y.), 444; *Mickey vs. Burlington Ins. Co.*, 35 Iowa, 174.

DIGEST OF RECENT CASES.

LIMITATION—CONSTRUCTION AS TO TIME.

1. The policy contained a clause providing that the loss should be paid within sixty days after due notice and satisfactory proof. *Held*, that no claim arises or accrues on the mere happening of the loss. Notice and proofs of loss are conditions precedent. By another condition, "no suit or action against the company for the recovery of any claim under or by virtue of this policy shall be sustained by any court of law or chancery, unless commenced within the term of one year next after any claim shall occur, and in case such suit or action shall be commenced against the company after the end of one year next after such loss or damage shall have occurred, the lapse of time shall be taken and admitted as conclusive against the validity of the claim thereby attempted to be enforced, any statute of limitations to the contrary notwithstanding." *Held*, that the second branch, requiring action to be brought within a year after the time of loss, is inconsistent with the first. The language is that of the company, and the latter must be held responsible for the ambiguity. The words must be construed most strongly against the party using them. Policies ought to be absolutely free from ambiguity, and so framed that "he who runs may read." It is a condition subsequent, involving a forfeiture of vested rights in a much briefer time than allowed by the statute of limitations, and though valid must be construed strictly against the company and liberally in favor of the assured. A defense founded on the breach of such a condition is *stricti juris*, and requires that the intention of the insured to stipulate away his claim be clearly shown. An action brought within a year after proofs of loss were furnished is valid, though more than a year had elapsed since the loss. The time of limitation begins when the proofs of loss are furnished, or at least sixty days thereafter.

Anderson vs. Fitzgerald, 4 H. of L. Cases, 510; Blackett vs. Ass. Co., 2 Crompt. & Jer., 251; Notmap vs. Anchor Ass. Co., 4 C. B. (N. S.), 481; Fitton vs. Accidental Death Ins. Co., 1 Best & Smith, 799; Fowkes vs. Ass. Ass'n, 3 ib., 925; Catlin vs. Springfield Fire Ins. Co., 1 Sumner, 440; Palmer vs. Warren Ins. Co., 1 Story, 364, 369; Bartlett vs. Union M. F. Ins. Co., 46 Me., 502;

Wilson vs. Conway F. Ins. Co., 4 R. I., 156; Wilson vs. Hampden F. Ins. Co., 4 ib., 166; Hoffman vs. Ætna Ins. Co., 32 N. Y., 413; Reynolds vs. Commerce F. Ins. Co., 47 N. Y., 604; N. Y. Belting Co. vs. Washington F. Ins. Co., 10 Bosw., 435; Merrick vs. Germania F. Ins. Co., 54 Penn., 284; Western Ins. Co. vs. Cropper, 32 ib., 355; Riddlesbarger vs. Hartford Ins. Co., 7 Wall., 391.

Chandler & Co. vs. St. Paul F. and M. Ins. Co., Minn. S. C., 21 Minn., 85; 4 Ins. Law Jour., 116.

2. In Ohio suit must be regarded as commenced when summons has been issued, and where summons was so issued within the twelve months prescribed by the policy, but by an error was directed to another company, though properly indorsed and served; *Held*, that an amendment of the mistake under the 137th section of the Code, and further prosecution of the action, though subsequent to the expiration of the twelve months, was valid.

Burton vs. Buckeye Ins. Co., O. S. C., 5 Ins. Law Jour., 54.

3. The policy provided that the loss was to be paid 60 days after due notice and proof. Also that no action should be sustainable until after an award had been obtained, nor unless such action should be commenced within 12 months after the loss occurred. *Held*, that a stipulated limitation in a policy must be construed in the ordinary and popular sense of the language. A loss "occurs" at the time of a fire, and not at the time of an award or the time allowed to a company to make payment, and the time began to run from the time of the fire. *Held*, that the condition limiting the time of action is not controlled by the previous 60 days clause.

Johnson vs. Humboldt Ins. Co., Ill. S. C., 91 Ill., 92; 8 Ins. Law Jour., 657.

4. The policy provided that the loss should be paid 60 days after the reception of satisfactory proofs and the amount had been satisfactorily agreed upon according to its terms; that upon giving notice within the 60 days, the company might elect to replace, and until the end of that time no suit should be instituted. Also that in case of disagreement the amount of damage should at the instance of the company be submitted to arbitration; also that no suit should be sustainable until after an award had been

obtained, nor unless commenced within six months after the loss should occur. The award was not made by the arbitrators until more than six months after the fire. *Held*, that the limitation is binding on the parties, but began to run at the time when the insured was entitled to bring suit, and not at the time when the loss physically occurred, and a suit begun within six months of the award was not too late.

Fullam vs. N. Y. Ins. Co., 7 Gray (Mass.), 61; Carraway vs. Merch. Ins Co., 26 La. An., 293; 8 Ins. Law Journal, 635, and cases there cited; Wood on Ins., p. 762, sec. 443.

Levy vs. Va. F. & M. Ins. Co., U. S. C. C. La., 9 Ins. Law Jour., 113.

5. Suit brought May 15, 1874, and filing of claim for a loss occurring February 22, 1873. Defendant answered, setting out the year and clause in its policy, which was as follows: "It is furthermore hereby provided and mutually agreed, that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery, until after the award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next ensuing after the loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding." Plaintiff replied, denying that his claim was debarred by limitation, as alleged in defendant's answer, and alleged that his cause of action accrued and became due upon the 30th of June, 1873, and that under the terms and conditions of said policy, the said plaintiff had commenced his action within the time allowed him therein. Defendant demurred and the court sustained the demurrer, and case was dismissed. In plaintiff's petition it was stated that defendant failed to have an award properly made, and that defendant's agent abused and insulted plaintiff, and refused to point out any defects in the proofs of loss, or to recognize them in any manner. The court said, in sustaining the demurrer,

that the company's agents were not compelled to recognize the claim of plaintiff.

Kuchenmeister vs. Brewers' Fire Ins. Co., Sup. Ct. of Cincinnati, 4 Ins. Law Jour., 799.

WHAT IS A WAIVER OF.

6. Where, by the misrepresentation of the company's officers, insured was induced to compromise, and assign his claim to an officer of a reinsuring company acting in the interest of that company, and so was deterred from bringing suit, such action is a waiver of the limitation clause.

Peoria M. & F. Ins. Co. vs. Whitehill, 25 Ill., 475; F. & M. Ins. Co. vs. Chestnut et al., 50 ib., 112.

Derrick vs. Lamar Ins. Co., Ill. S. C., 5 Ins. Law Jour., 42.

7. Where the complaint was filed within the year, but no summons was issued, at the request, and upon the agreement of the defendant's attorney to enter an appearance, the defendant cannot set up that suit was not begun within a year.

Akin vs. L., L. & G. Ins. Co., U. S. C. C. Ark., 6 Ins. Law Jour., 341.

8. An adjustment of the loss indorsed upon the policy, though there is no expressed promise to pay, is an acknowledgment of the amount due and an implied promise, which is a waiver of the limitation clause requiring an action to be brought within one year.

Phillips on Ins., sec. 1815; Park on Ins., vol. 1, p. 266; Starkie on Ev., vol. 3, 1163; Farmers and Merchants' Ins. Co. vs. Chestnut, 50 Ill., 112; Chitty's Pleading, vol. 1, p. 358.

The action need not be brought on the policy; recovery can be had under a count in the declaration on an account stated.

1 Chitty's Pleading, 358.

Illinois Mut. Ins. Co. vs. Archdeacon et al., Ill. S. C., 82 Ill. 236; 6 Ins. Law Jour., 417.

9. Where the conduct, declarations, and delay of the officers and agents would justify the inference that they were acting in bad faith to delay a suit, and that the insured was led by such actions

to delay, a finding that the limitation clause has been waived will not be disturbed. A finding will not be disturbed where the court cannot say as matter of law that there was not enough evidence to sustain the verdict.

Fullum vs. New York Union Ins. Co., 7 Gray, 61; *Ames vs. New York Union Ins. Co.*, 14 N. Y., 254; *Goodwin vs. Amoskeag Ins. Co.*, 20 N. H., 73.

Little vs. Phœnix Ins. Co., *Mass. S. J. C.*, 123 *Mass.*, 380; 7 *Ins. Law Jour.*, 481.

10. Where suit was delayed through promises of the company to settle: *Held*, that where delays are caused by the acts, or promises, of a defendant, he cannot avail himself thereof or charge laches thereon.

P. M. and F. Ins. Co. vs. Whitehill, 25 Ill., 466; *F. & M. Ins. Co. vs. Chestnut et al.*, 50 Ill., 116; *Andes Ins. Co. vs. Fish*, 71 id., 620.

Mann, Receiver vs. Meyer, *Ill. S. C.*, 8 *Ins. Law Jour.*, 905.

11. Repeated promises of settlement by the company, insisting that legal proceedings were unnecessary, is a waiver of the limitation clause regarding suit.

Havana Ins. and Banking Co. vs. Mayer, *Ill. S. C.*

12. A condition in a policy of insurance, to the effect that all claims under the policy shall be barred, unless prosecuted within one year from the date of loss, and that no claim shall bear interest before judicial demand, is legal and valid as a part of the contract of insurance. When a policy of insurance stipulates that all claims for loss shall be barred unless prosecuted within one year from the date of the loss, an allegation in the petition in a suit by the insured, which in effect declares that the company agreed not to take advantage of the delay in suing on the claim for the loss until the company had completed the investigation touching the circumstances attending the loss, would, if coupled with an averment that such agreement was made before the expiration of twelve months, state a sufficient excuse for not filing the suit within the year. It would be otherwise when the agreement was made after the expiration of the year.

Insurance Co. vs. Lacroix, *Texas S. C.*, 45 *Texas*, 158.

WHAT IS NOT A WAIVER OF.

13. The parties to a contract may legally stipulate for a shorter limitation to actions than that fixed by the general law.

Ames vs. New York Union Ins. Co., 14 N. Y., 253; *Ripley vs. Ætna Ins. Co.*, 30 id., 136; *Roach vs. N. Y. & E. Ins. Co.*, id., 546; *Mayor vs. Hamilton Ins. Co.*, 39 id., 46.

The policies stipulated that no suit should be sustained unless commenced within 12 months of the loss. An injunction was granted to a third party, restraining the company from paying, and the insured from receiving the money due until further order, and was not dissolved until more than 12 months had elapsed. The order was served on the insured, but not on the company. The suit was not brought until the injunction had been dissolved. *Held*, that the case is not within the rule that a party may not claim a forfeiture resulting from his own act.

Vin. Abr., tit. Condition, N. C. C. 23; *Bac. Abr.*, tit. Condition, O. 3.

Held, that the statutory provision of New York, saving the rights of parties suspended by injunction, applies only to cases within the statute of limitations, and does not aid the present case.

Barker vs. Millard, 16 Wend., 572; *Riddlesbarger vs. Hartford Ins. Co.*, 7 Wall., 386.

Held, that a party who has lost his remedy at law through injunction, must seek aid through equity.

2 Cases in Ch., 217; *Pulteney vs. Warren*, 6 Ves., 72; 1 Vern., 74; 2 Atk., 615; dissenting from 1 Atk., 1; *Banning on Lim. of Act.* 33; *Marby vs. Marby*, L. R., 3 Ch. D., 101.

Held, that the injunction having been obtained by a stranger, was not an act of the law which deprived the company of the benefit of the limitation. Had it absolutely prohibited bringing suit, the court would undoubtedly have modified it on suggestion to save the rights of the parties, and neglect to make such suggestion would have been laches. A suit commenced in violation of the injunction would not have been a defense to the company. The order would not have been violated by instituting a suit.

Vining's Abr., tit. Condit., R. C. 1; *Comyn's Dig.*, tit. Condition, L. 14; *People vs. Bartlett*, 3 Hill, 570; *People vs. Manning*, 8 Cow., 297; *Kelly vs. Cowing*, 4 Hill, 266; *Burt vs. Mapes*, 1 id., 649; *Parker vs. Wakeman*, 10 Paige, 485; *Hudson vs. Plets*, 11 id., 180; *High on Injunctions*, 503.

Held, that the case was barred by lapse of time.

Wilkinson vs. First National Ins. Co., N. Y. C. A., 72 *N. Y.*, 499; 7 *Ins. Law Jour.*, 775.

14. The charter of an insurance company required all suits to be brought on policies issued by the company within twelve months from the date of loss. A policy issued to the plaintiff, contained a stipulation that it was made and accepted subject to the charter, and also provided that no suit or action for the recovery of any claim by virtue of the policy, should be sustained in any court unless commenced within twelve months after the loss should occur, and should any suit or action be commenced after the expiration of twelve months, the lapse of time should be taken and deemed as conclusive evidence against the validity of the claim, any statute of limitation to the contrary notwithstanding. Plaintiff brought suit on the policy more than twelve months after a loss had occurred. *Held*, that the above stipulation was operative and binding, and precluded the plaintiff from maintaining his suit.

Amesbury et al. vs. Bowditch Mut. F. Ins. Co., 6 *Gray*, 596; *Cray vs. Htfd. F. Ins. Co.*, 1 *Blatchf. C. C.*, 280; *Ketchum vs. Protection Ins. Co.*, 1 *Allen (N. B.)*, 136, 187; *Wilson vs. Aetna Ins. Co.*, 27 *Ver.*, 99; *Keim et al. vs. Home Mut. F. & M. Ins. Co. of St. Louis*, 42 *Mo.*, 38.

Glass vs. Walker, assignee, Mo. S. C., 66 *Mo.*, 32; 7 *Ins. Law Jour.*, 526.

15. Stipulation that no action can be sustained on policy unless commenced within 12 months, is binding. The provision cannot be waived by a local agent or adjuster, though if such agent, by fraud, induce delay of suit, this may be an excuse.

Underwriters' Agency vs. Sutherlin, Ga. S. C., 65 *Ga. R.*, 266.

16. A policy provision, limiting the right of action to one year after the claim shall have accrued, is valid.

Ripley vs. Aetna Ins. Co., 30 *N. Y.*, 136.

Under provisions of the New York code, sec. 168 of the old, and sec. 522 of the new, the plaintiff has the benefit of every possible answer to a defense made by way of new matter, not constituting a counter claim as fully as though it were alleged in

the most perfect manner evidence; for that purpose taking the place of pleading.

Emory vs. Pease, 20 N. Y., 62; *N. Y. Ice Co. vs. N. W. Ins. Co.*, 23 N. Y., 357; *Dobson vs. Pearce*, 12 N. Y., 156; *Phillips vs. Gorham*, 17 N. Y., 270.

A successful defense to one action does not estop a party from insisting that a second action cannot be maintained because commenced too late, nor does the acceptance of costs, given to indemnify a successful litigant for the false clamor of his adversary, furnish the latter an excuse for non-compliance with a contract stipulation. A consent to further time to prepare for one suit does not affect the limitation of remedies as applied to another suit on the same subject matter. Allegation of counsel, that the remedy of his opponents was in equity and not in law, does not affect the rights of the parties so far as relates to a subsequent action. Where an action at law was commenced within the required time, and although leave was granted to amend the form of action, the plaintiff elected to discontinue, and neglected to exercise his right to commence a new action before the expiration of the time, he cannot avail himself of an action in equity whose real object is simply to avoid the consequence of delay.

Citing *Ripley vs. Ætuna Ins. Co.*, 30 N. Y., 136; *Riddlebarger vs. Hartford Ins. Co.*, 7 Wallace, 386; *Maher vs. Hibernian Ins. Co.*, 67 N. Y., 283. Distinguishing *Woodbury Savings Bank vs. Charter Oak F. & M. Ins. Co.*, 31 Conn., 517; *Hay vs. Star Ins. Co.*, 13 Hun., 496.

Arthur vs. Homestead F. Ins. Co., N. Y. C. A., 78 N. Y., 462; 8 *Ins. Law Jour.*, 918.

See Cross Index for other cases bearing on LIMITATION.

LOADING OFF SHORE.

DIGEST OF RECENT CASES.

LOADING OFF SHORE—WHAT IS.

1. The policy contained the clause, "loading off shore prohibited." The vessel was lost while loading from a bridge-pier near the shore of lake Michigan. *Held*, that the words were not

of such doubtful import that it was impossible for the court to discover their meaning on reading the instrument; they do not, when taken in a natural sense, prohibit loading at a bridge-pier, and it was not incumbent on plaintiff (insured) to show that their meaning did not prohibit such loading, in presenting his case. *Held*, that evidence was admissible to show their true meaning, and the question whether they had acquired a definite and notorious technical sense that prohibited loading from a bridge-pier, was proper for the jury.

1 *Parsons on Mar. Ins.*, 77 *et seq.*

Held, that their sense must be determined from their definite and well known meaning, if such they had, in all maritime matters, and not merely from the meaning which might be attached by marine underwriters. *Held*, that it was error to charge that if the phrase may be understood in more senses than one, it was to be interpreted in the sense in which the insurer had reason to suppose the insured understood it. The question is not what was the intention of the parties, but what was the meaning of the words they have used.

1 *Parsons, Mar. Ins.*, 74; *Rickman vs. Carstairs*, 5 B. & Ad., 641-663.

Cases of *Morse vs. Buffalo F. & M. Ins. Co.*, 30 Wis., 531-539; *Potter vs. Ontario & Livingston Mut. Ins. Co.*, 5 Hill, 147-149; *Barlow vs. Scott*, 24 N. Y., 40-42; *Hoffman vs. Aetna Ins. Co.*, 32 do., 405-413, criticised.

Johnson vs. Northwestern Nat. Ins. Co., Wis. S. C., 39 Wis., 87; 5 *Ins. Law Jour.*, 329.

See Cross Index for other cases bearing on **LOADING OFF SHORE.**

LOSS.

ABSTRACT OF THE LAW.

a. Liability for a loss is limited to such as results directly or proximately from some of the perils insured against. In case of insurance against fire, the loss must be due proximately at least to the agency of fire, attended with actual ignition.

Babcock vs. Montgomery Ins. Co., 6 Barb. (N. Y.), 637; *Austin vs. Drew*, 4 Camp., 361; *Kenniston vs. Ins. Co.*, 14 N. H., 341; *Scripture vs. Lowell Ins. Co.*, 10 Cush. (Mass.), 356; *White vs. Republic F. Ins. Co.*, 57 Me., 91.

b. In fire insurance, a total loss does not necessarily involve the destruction of the whole property, but simply such a loss as absorbs the whole policy.

Bunyon on Insurance, 115.

c. In marine insurance, an actual total loss involves the total destruction of the property insured, as to its original shape and as a thing of substantial value, or its loss beyond all hope of recovery.

Hagg vs. Augusta Ins. Co., 7 How. (U. S.), 595; Walker vs. Protection Ins. Co., 29 Me., 317.

d. If the subject of insurance be not wholly lost, under a marine policy the loss is but partial, unless made constructively total by abandonment.

Smith vs. Manufacturers' Ins. Co., 7 Met. 448; Gracie vs. N. Y. Ins. Co., 8 Johns., 237; Earl vs. Shaw, 1 Johns., 313.

e. In case of freight, any disaster or misfortune which effectually breaks up the voyage causes a total loss either actual or constructive, unless the cargo can be forwarded at a reasonable cost. But if the shipowner by thus forwarding, earns his full freight, the underwriter is exempt.

Ogden vs. Gen. Mut. Ins. Co., 2 Duer, 204; Field vs. Citizens' Ins. Co., 11 Mo., 50; Willard vs. Ins. Co., 24 Mo., 561; Calender vs. Ins. Co. of N. A., 5 Binn., 525; Marcardier vs. Ins. Co., 8 Cranch, 30.

See further on this subject under ABANDONMENT, FREIGHT, GENERAL AVERAGE, MEASURE OF DAMAGES, PARTICULAR AVERAGE, POLICY.

DIGEST OF RECENT CASES.

LOSS—WHAT IS TOTAL.

1. Where machinery was insured free from average unless general, and was wrecked; *Held*, that if every piece was so damaged as to be unfit for use when supplied with its corresponding connecting pieces, there was a total loss.

Great Western Ins. Co. vs. Fogarty, U. S. S. C., 3 Ins. Law Jour., 714.

2. The plaintiff sued on a policy on chartered freight. By the charter-party, which contained the usual exception of dangers of navigation, the vessel was to go from Liverpool to Newport, and there load a cargo of iron rails for San Francisco, and the policy insured the freight for that voyage. The ship ran on shore between Liverpool and Newport. She was ultimately got off; and though the damage she sustained was not such as to constitute a total loss, the time necessary for getting her off and repairing

her, so as to be a cargo-carrying ship, was so long as to put an end in a commercial sense to the speculation as between ship-owners and charterers, and the latter accordingly abandoned the contract, and hired another vessel, by which they forwarded the rails to San Francisco. *Held*, that the charterer was discharged from his contract by what had occurred, and that therefore the plaintiff was entitled to recover for a total loss of freight.

Jackson vs. Union Marine Ins. Co., Eng. Court of Ex. Ch., 4 Ins. Law Jour., 393.

3. The policy provided that, "damage to property not totally destroyed, unless the amount of said damage is agreed upon between the insured and the company, shall be appraised by disinterested and competent persons, mutually agreed upon by the parties." Also the company reserved the right to take any part or all of the property appraised, paying market value therefor, in case the damage as appraised was deemed excessive. *Held*, that it was doubtful whether the stipulations are sufficiently definite to be valid, and the latter stipulation would be applicable only to personal property. The policy also provided for a verified statement of the value of the property and amount of loss, and in no case should the claim be greater than the actual cash value of the property at the time of fire. There was conflicting evidence as to whether the salvage was of value, but some of it was used in rebuilding. The company claimed that the loss was partial and they were entitled to an appraisal, when the insured insisted that it was total. *Held*, that a total loss does not mean an absolute extinction. If the building after the fire has lost its identity and specific character as a building the loss is total within the meaning of the policy.

Nave vs. Home Mut. Ins. Co., 37 Mo., 430; Huck vs. Globe Ins. Co., 8 Ins. Law Journal, 912; Ins. Co. vs. Fogarty, 19 Wall., 644; Hugg vs. Augusta Ins. Co. 7 Howard, 595; Marcardier vs. Chesapeake Ins. Co., 8 Cranch, 47; Judah vs. Randall, 2 Caine's Cas., 324.

Williams vs. Hartford F. Ins. Co., Cal. S. C., 54 Cal., 442; 9 Ins. Law Jour., 447.

4. Besides finding generally that the building was wholly destroyed by fire, the jury found specifically that no portion of the brick walls remaining after the fire could be used in rebuilding

it. That the foundations so remaining were not sufficient to support a building of the weight and dimensions of the one burned. That the expense of removing the worthless fragments of the whole building would at least equal the value of all materials left after the fire, and that such materials were worth less than the cost of getting them out of the wrecks of the building. *Held*, that these specific findings show the building to have been "wholly destroyed," within the meaning of Ch. 347, of 1874.

Harriman et al. vs. Queen Ins. Co., Wis. S. C., 49 Wis., 71.

5. In an action on a policy of marine insurance, there was evidence that the vessel insured, a whaling vessel, was jammed fast in the ice in the Arctic Ocean, with no open water in sight, and drifting northward with the current; that her officers and crew finding it impossible to extricate her with the utmost efforts, and being nearly worn out with fatigue and want of sleep, in order to save their lives, left her in their boats, taking with them their guns and whaling gear, and, by passing through narrow strips of water, and hauling the boats over the ice, reached the whaling fleet in safety, fifty miles south of where they left the vessel; that ten days afterwards, the men, boats and guns being scattered in different vessels, and some of them having gone home, the ice loosened, and the abandoned vessel was got out by the master and crew of another vessel, and held for salvage; that the master of the vessel insured was not able, by the exercise of reasonable efforts, to obtain a sufficient crew or whaling craft, or to gain possession of the vessel to pursue the voyage on which he was employed, and for which she was insured; that the vessel was taken by the salvors to San Francisco, and before her arrival there, was abandoned by her owners to the underwriters. *Held*, that it was competent for the jury to find a verdict against the underwriters for a constructive total loss. Under a declaration on a policy of marine insurance for a constructive total loss, a total loss may be recovered. It is not necessary, in a declaration on a policy of marine insurance, to allege the abandonment of the vessel to the underwriters, or the facts necessary to constitute the total loss relied on.

Snow vs. Union Ins. Co., Mass. S. J. C., 119 Mass., 592.

6. By the general law of marine insurance, independently of any particular clause in the policy or local usage, if a partial loss of a vessel insured is repaired and a total loss afterwards happens during the term of the policy, the insurer is liable for the amount of both losses, although it exceeds the amount named in the policy.

Matheson vs. Equitable Mar. Ins., Mass. S. J. C., 118 Mass., 209.

7. A total wreck is necessary to an actual total loss. The vessel must cease to exist as a vessel though fragments reach the home port.

Burt vs. Brewers' Ins. Co., N. Y. S. C., 16 N. Y. S. C., 383.

8. A policy of insurance on a steamboat contained the following stipulations: "In no case whatever shall the assured have the right to abandon, until it shall be ascertained that the recovery and repairs of said vessel are impracticable." "That the assured shall not abandon as for a total loss, * * * unless the injury sustained be equivalent to fifty per centum on the agreed value (of the vessel) in this policy." "In the adjustment of claims for partial loss or damage * * * no deduction will be made on account of new work for eighteen months from the date of the boat's departure on its first trip. From the termination of said eighteen months until the expiration of the twelve succeeding months, a deduction of one-fifth 'new for old' will be made on account of new work; and subsequently (i. e., after the expiration of thirty months,) a deduction of one-third 'new for old' will be made in all adjustments of such claims for partial loss." *Held*, That the term "impracticable" does not relate to a mechanical possibility, nor to the ability to raise and repair the vessel at any cost; but that it is legally impracticable to recover and repair the vessel if the expense of so doing will exceed fifty per cent of her actual value. *Held*, That the law in the United States is, that in estimating whether the injury sustained will equal or exceed fifty per cent of the value of the vessel when repaired, her *actual* value, and not her *agreed* value in the policy, is to govern; and that this rule of law is not changed by the provision in the policy that the "assured shall not abandon, as for a total loss, unless the

injury sustained be equivalent to fifty per centum on the agreed value in the policy," because if the vessel be injured to more than fifty per centum of her actual value, this is equivalent to, or in the same proportion as, fifty per centum of her agreed value. *Held*, That in estimating whether the cost of recovery and repairs will equal or exceed fifty per centum of the actual value of the vessel, one-third of the expenses of repairs "new for old" material, is not to be deducted. That this deduction is allowed only in cases of partial loss, where the vessel, after the repairs, is returned to the insured, who has the benefit of the new for the old material; but in cases of constructive total loss by abandonment, the vessel is not returned and the insurers have all the benefit of the new material. When after the disaster the insured gives notice to the insurer that he abandons as for a total loss, because the cost of raising and repairing the vessel will exceed fifty per centum of her agreed value in the policy, such reason is not the statement of a fact which concludes the insured or which could mislead the insurer, but it is at most an expression of opinion as to which the insurer can judge as well as the insured. Both are at last bound by the test of the actual cost of raising and repairing the vessel, and by the construction which competent authority shall give to the terms of the policy.

Peabody Ins. Co. vs. Mem. and Ark. R. Packet Co., Sup. Ct. of Cincinnati, O., 7 Ins. Law Jour., 557.

9. One test as to whether a loss is constructively total, is whether a prudent uninsured owner would have undertaken under the circumstances, to have repaired the vessel.

Pickup vs. Thames & Mersey, Mar. Ins. Co., Eng. Court of Q. B. L.R., 3 Q. B. D., 594.

10. A claim for constructive total loss is not answered by setting up a by-law made part of the policy, providing that the company should only pay for the absolute damages and that no acts of the company should be taken as a recognition of abandonment, and that the company might take all means in its power to procure the safety of the vessel, and the owner should contribute his proportion of the expenses.

Forwood vs. N. Wales Mut. Mar. Ins. Co., Eng. Q. B.

WHAT IS NOT TOTAL.

11. Where a damaged steamboat remains *in specie*, and can be repaired at any cost, however great, no actual total loss can be claimed without abandonment.

Globe Ins. Co. vs. Sherlock, O. S. C., 25 O., 50; 4 *Ins. Law Jour.*, 515.

12. The stranding or submerging of a vessel is not necessarily a total loss. An abandonment under such circumstances is not binding on the insurers, nor are they concluded by the report of a survey condemning her and recommending her sale. If they can repair for less than half her value, and take possession for that declared purpose, they may return her to the owner. If the tender is made within a reasonable time, and no objection is made as to the sufficiency of the repairs, it is conclusive, whether accepted by the owner or not.

Wood vs. Lincoln & Kennebec Ins. Co., 6 Mass., 479; *Peele vs. Suffolk Ins. Co.*, 7 Pick., 254; *Commonwealth Ins. Co. vs. Chase*, 20 Pick., 142; *Hall vs. Franklin Ins. Co.*, 9 Pick., 455; *Sewell vs. United States Ins. Co.*, 11 Pick., 90; *Reynolds vs. Ocean Ins. Co.*, 22 Pick., 191.

The acceptance of the vessel does not preclude the insured from claiming further damages if deficiencies afterward appear. But he cannot, after refusing the tender and lying silent about the sufficiency of the repairs, afterward recover for a total loss by proving them insufficient.

Paddock vs. Comm. Ins. Co., 104 Mass. St., 1, 534; *Case of Copelin vs. Ins. Co.*, 9 Wall., 461, distinguished.

Held, that in such a case there was no total loss of freight because of an actual or constructive loss of the ship.

Jackson vs. Union Marine Ins. Co., L. R., 8 C. P., 572; 10 C. P., 125; *Rankin vs. Potter*, L. R., 6 H. L., 98; *McGaw vs. Ocean Ins. Co.*, 23 Pick., 409; *Thwing vs. Washington Ins. Co.*, 10 Gray, 455; *Coolidge vs. Gloucester Marine Ins. Co.*, 15 Mass., 345.

Held, that where the plaintiff voluntarily abandoned his charter-party on the ground of a total loss, while he could after a reasonable delay on account of the repairs, have fulfilled the contract, he is not authorized to claim damages on the ground that the

charterer was no longer obligated to fulfill his contract and furnish freights.

Marmaud vs. Melledge et al., *Mass. S. J. C.*, 123 *Mass.*, 173 ; 7 *Ins. Law Jour.*, 148.

13. Where a vessel after the accident remained *in specie* and reached her port of destination, the underwriters are not liable on an insurance against actual total loss.

Burt vs. Brewers and Maltsters' Ins. Co., *N. Y. C. A.*, 78 *N. Y.*, 400 ; 8 *Ins. Law Jour.*, 850.

WHEN THE INSURERS ARE OR ARE NOT LIABLE.

14. A claim in a marine policy, provided that if the vessel was detained by ice or the closing of navigation from terminating the voyage, the policy on the cargo should cease, and the unexpired premium should be returned. Another clause provided that the vessel might touch or stay at any ports or places when obliged by stress of weather or other unavoidable accident, without prejudice to the insurance. The vessel, a canal boat, while being towed down the Delaware, was with several others separated by a heavy gale from the tugs and forced ashore, losing a portion of her deck cargo. Ice did not interfere with navigation at the time, but during the night ice formed around the boats so that the tugs could not reach them. After the thaw, some two weeks later, the wind and ice forced the boat against another vessel, sinking it, and destroying more than half the cargo. The owners abandoned and claimed a total loss. *Held*, that the ice clause is not ambiguous and needs no interpretation from experts; its signification is purely a question of law. It is not a condition precedent but a condition subsequent. Her insurers are liable until the happening of the prescribed event. *Held*, that the stress of weather and not the ice was the proximate cause of the destruction, and of all the consequences, including the ultimate loss which followed.

12 Wall., 196 ; 1 Phillips on Ins., sec. 1136-7 ; 2 Pars. on Mar. Law, 261 ; *Ionides vs. Universal Mar. Ins. Co.*, 14 C. B., N. S., 259 ; *Boudrett vs. Henlig*, Holt N. P. C., 149 ; *Hohn vs. Corbett*, 2 Bing., 295 ; *Magoun vs. N. E. Mar. Ins. Co.*, 1 Story, 164, 155 ; Phillips on Ins., sec. 1161.

Stranding is not *ipso facto* a total loss, but is *prima facie* of a total loss, and whether it is so to be regarded or not, depends on the circumstances.

Wood vs. Lincoln &c. Ins. Co., 6 Mass., 479; Manning vs. Newnham, 3 Douglas, 136; 2 Phil. on Ins. 1526; Sewall vs. U. S. Ins. Co., 11 Pick., 90, 94.

The burden of proof is on the underwriters to show that the loss is the direct result of the excepted peril.

1 Phil. on Ins., sec. 1129, sec. 1159; Levi vs. Allnutt, 15 East., 269. Cases distinguished and excepted to, of Patrick vs. Conn. Ins. Co. 11 Johnson, 14; Hadkinson vs. Robinson, 3 B. & P., 383; (3 Kent's Com., 293-4); Forster vs. Christie, 11 East., 205; Spayer vs. N. Y. Ins. Co., 3 John., 83; Livie vs. Janson, 21 East., 647; Ionides vs. Universal Ins. Co. 14 C. B., N. S., 259; Dole vs. N. E. Ins. Co., 2 Cliff., 394, 433.

Brown vs. St. Nicholas Ins. Co., N. Y. Com. A., 4 Ins. Law Jour., 377.

15. Where the negligence charged was not such as to be presumptive of fraud that would constitute barratry; *Held*, that the underwriters were liable for a loss resulting from a storm, which was the proximate cause, although negligence of the officers and crew was the remote cause.

Waters vs. Merchants' L. Ins. Co. 1 McLean, 275; 11 Pet., 213; Ins. Co. vs. Powell, 13 B. Mon., 311; Nelson vs. Suffolk Ins. Co., 8 Cush., 499; Walker vs. Mailland, 5 Barn. & Ald., 171; Dixon vs. Sadler, 5 Mees. & Wels., 405; 2 Arnould on Ins., 770.

National Ins. Co., vs. Webster, Ill. S. C., 83 Ill., 470; 6 Ins. Law Jour., 535.

16. In an action on an insurance policy for loss of a barge with her cargo, the petition alleged an insurance against all loss "in said voyage by reason of the adventures and perils of said rivers, and all other perils," etc., and then alleged that she sprung a leak and sunk at port. *Held*, that although the loss, as stated, did not become within the perils of the voyage specifically insured against, it may have been caused by one of the "other perils," and that the general allegation following the special statement of loss, that the damage arose from "one of the perils insured against," was sufficient on demurrer; that whether such was the fact was a question for the jury on the evidence, or for the court on motion for nonsuit. The sinking of a boat at port raises a violent pre-

sumption of unseaworthiness, and this is always a defense to suit for such loss.

Gartside vs. Orphan's Ben. Ins. Co., Mo. S. C., 62 Mo., 322.

17. The ship was beached at an intermediate port for the purpose of repairing an injury received during the voyage, and when the tide left she was so badly strained as to become a total wreck.

The necessity of the repairs and the propriety of beaching were admitted. The policy insured against the usual perils of the sea, "and all other losses and misfortunes which shall come to the damage of the ship." *Held*, that an accident in the course of necessary repairs is a peril *ejusdem generis* of those named in the policy.

Ellery vs. New Eng. Ins. Co., 8 Pick. 14; Devaux vs. Janson, 5 Bing. N. C., 519.

Held, that if the loss results without any apparent accident or damage sufficient to occasion it, the presumption is that it was from inherent weakness for which the underwriter is not responsible, and the burden of proof is on the insured.

Paddock vs. Franklin Ins. Co., 11 Pick., 277; Paddock vs. Conn. Ins. Co., 104 Mass., 520.

Held, that the fact that she was seaworthy at the inception of the risk, her good conduct at sea, and her apparent soundness at the intermediate port, was evidence from which a jury might find that the loss resulted from putting her on the beach, and not from inherent weakness.

Paddock vs. Franklin Ins. Co., 11 Pick., 277, 232; Anderson vs. Morice, L. R., 10 C. P., 58, 609; Potter vs. Suffolk Ins. Co., 2 Sumn., 197.

Held, that where evidence of seaworthiness at the inception, was objected to by defendant, and waived by plaintiff, the seaworthiness being admitted, refusal to allow the defendant to cross-examine, and put in evidence on that subject matter, was proper.

Swift vs. Union Mut. Mar. Ins. Co., Mass. S. J. C., 122 Mass. 573; 7 Ins. Law Jour., 195.

18. An instruction by the insured to his agent not to interfere in case of fire unless the entire stock could be saved, in order

that no dispute might occur with the insurers as to the amount of loss, will not bar a recovery where it affirmatively appears that no effort of the assured or his agents could avert the loss.

Willis vs. Germania, etc., Ins. Co., N. C. S. C., 79 N. C., 255; 8 Ins. Law Jour., 449.

19. The captain, in a letter to the owner neglected to mention the loss of an anchor. The insured subsequently effected a policy, at and from etc. to etc. *Held*, that the particular average loss of the anchor was an exception out of the policy, but its innocent non-communication did not work a forfeiture.

Stribley vs. Imp. Mar. Ins. Co., Eng. Q. B. L. R., 1 Q. B. D., 507.

WHAT IS PROXIMATE CAUSE OF.

20. By the negligence of the servants of the railroad, the sparks from an engine set fire to a warehouse near its track and destroyed it. There being a high wind at the time, sparks from the burning warehouse set fire to the stable of the appellee and destroyed it. The stable was 101 rods from the warehouse, with no intervening buildings. When it was burned there was a high wind blowing toward the stable. *Held*, that the burning of the appellee's stable was not the natural and proximate consequence of the burning of the warehouse. The following, from the opinion in *Flint vs. T. P. and W. R. R.*, 59 Ill., 349, was adopted by the court as the rule for determining whether the cause be proximate or remote. "If loss has been caused by the act, and it was, under the circumstances, a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause, whether the house burned was the first or the tenth, the latter being so situated that its destruction is a consequence reasonably to be anticipated from setting the first on fire. If, on the other hand, the fire was spread beyond its natural limits, by means of a new agency—if, for example, after its ignition a high wind should arise and carry the burning brands to a great distance, by which a fire is caused in a place that would have been safe but for the

wind, such a loss might fairly be set down as a remote consequence, for which the railroad company should not be held responsible."

Toledo, Wabash & Western R. W. Co. vs. Muthersbaugh, Ill. S. C., 4 Ins. Law Jour., 398.

21. In an action for injuries to plaintiff's woodland, alleged to have been caused by fire kindled through the negligence of the defendants upon their track or roadway: *Held*, that it was proper to submit to the jury the question of actual negligence, there being a sufficient conflict of testimony to create a question of probability or veracity. The jury are the judges, under the direction of the court, of the proximity or remoteness of the cause of the injury. The rule for determining what is a proximate cause may be stated thus: that the injury must be the natural and probable consequence of the negligence, and that this consequence might and ought to have been foreseen under the surrounding circumstances. These are the circumstances of the particular case, and must be referred to the jury.

Pennsylvania Railroad Company vs. Hope, Pa. S. C., 5 Ins. Law Jour., 470.

See Cross Index for other cases bearing on Loss.

LOST OR NOT LOST.

1. The words lost or not lost are not necessary to make a policy retroactive, if it appear from the description of the risk and the subject matter that such was the intention.

Merc. Ins. Co. vs. Folsom, U. S. S. C., 3 Ins. Law Jour., 489.

See Cross Index for other cases bearing on Lost or Not Lost.

MASTER.

ABSTRACT OF THE LAW.

a. The master is the agent of all parties concerned in the voyage, and in case of necessity becomes, by operation of law, the agent of insurer as well as of insured.

Phillips vs. St. Louis &c. Ins. Co., 11 La. An., 459; *Delaware Ins. Co. vs. Winter*, 38 Penn. St., 176; *Brig Sarah Ann*, 2 Sum., 206; *Catlett vs. Ins. Co.*, 4 Wend., 75; *Gordon vs. Ins. Co.*, 2 Pick., 249.

b. The master may not sell or hypothecate except in case of extreme necessity, and when acting in perfect good faith for all parties, and his justification, when the facts are in dispute, is usually a question for the jury.

Fontaine vs. Columbian Ins. Co., 9 Johns., 30; *Gordon vs. Ins. Co.*, 2 Pick., 249; *Paddock vs. Com. Ins. Co.*, 2 Allen, 93; *Winn vs. Columbian Ins. Co.*, 12 Pick., 279; *Dunning vs. Ins. Co.*, 57 Me., 108; *Stephenson vs. Ins. Co.*, 54 Me., 55.

c. The master, after abandonment, becomes the agent of the insurer.

Catlett vs. Ins. Co., *supra*; *Delaware Ins. Co. vs. Winter*, *supra*; *Mellon vs. Bucks*, 17 Mart. (La.), 371; *Gould vs. Citizens' Ins. Co.*, 13 Mo., 524; *Mordecai vs. Ins. Co.*, 12 Rich., 512.

d. A purchase by the master after abandonment, no matter for whom, will inure to the benefit of the insurers if they adopt it, and if the insured refuses to surrender the purchase, he cannot recover for a total loss.

Maryland Ins. Co. vs. Bathurst, 5 G. & J., 150.

e. The master must, if possible, communicate to owner before selling, and the circumstances must be such as would justify an abandonment.

Beekman vs. Ins. Co., 2 Duer., 342; *Stephenson vs. Ins. Co.*, 7 Allen, 232; *King vs. Hartford Ins. Co.*, 1 Conn., 333; *Robertson vs. Clarke*, 1 Bing., 445; *Bryant vs. Ins. Co.*, 13 Pick., 543.

See further on this subject under ABANDONMENT, BARRATRY, DEVIATION, EXPENSES, GENERAL AVERAGE, NEGLIGENCE, PERILS OF THE SEA, SEAWORTHINESS, SALVAGE.

DIGEST OF RECENT CASES.

1. A selection of a less peril to avoid a greater, by the master in case of voluntary stranding, will justify a general average contribution from the cargo.

O'Connor vs. The Ocean Star, U. S. C. C., 1 Holmes, 248.

2. Mere carelessness or negligence, or unskillfulness of the master, will not relieve the company unless so stipulated.

Levi vs. N. O. Ins. Ass., 63 U. S. C. C. La., 63 Wood R.

See Cross Index for other cases bearing on MASTER.

MEASURE OF DAMAGES.

ABSTRACT OF THE LAW.

a. The measure of damages is the amount of actual loss as measured by the value of the property at the time and place of loss.

Savage vs. Corn Exchange Ins. Co., 36 N. Y., 635; *American Ins. Co. vs. Griswold*, 14 Wend. (N. Y.), 309; *Hoffman vs. Western M. and F. Ins. Co.*, 1 La. An., 216.

b. Deterioration from any cause, at the time of fire may be shown in abatement of liability.

Hoffman vs. Western etc. Ins. Co., *supra*.

c. The original cost or cost of reproduction, is no necessary element of the value.

Carson vs. Marine Ins. Co., 2 Wash. C. C. (U. S.), 468; *Commercial Ins. Co. vs. Sennett*, 37 Penn. St., 205; *Ætna Ins. Co. vs. Johnson*, 11 Bush. (Ky.), 587.

d. The value in case of a building, is not the cost of its replacement, but what it is worth in its condition, at the time of loss.

Ætna Ins. Co. vs. Johnson, *supra*.

e. Consequential damages are not admissible.

Nibloe vs. N. A. Ins. Co., 1 Sandf., N. Y., 551.

f. In case of replacement, however, no special allowance for deterioration is admissible; the thing must be replaced substantially as before the fire, and consequential damages may be claimed in case of unreasonable delay.

Brinley vs. National Ins. Co., 11 Met. (Mass.), 195; *Home Mutual Ins. Co. vs. Garfield*, 60 Ill., 124.

g. In the case of goods or other property having a ready sale, the market value at the time and place is usually the measure of damages.

Marchesseau vs. Merchants' Ins. Co., 1 Rob. (La.), 438; *Hercules Ins. Co. vs. Hunter*, 14 C. C. S., 1137; *Eq. F. Ins. Co. vs. Quin*, 11 L. C., 170.

h. In the case of insurance on a limited interest, such as a mortgage, and not on the property itself, the actual loss, within the policy, is the measure of recovery.

Hadley vs. N. H. F. Ins. Co., 55 N. H., 110.

i. The value of any remaining security cannot be shown to depreciate the claim under such a limited interest.

Carpenter vs. Washington Ins. Co., 16 Pet. U. S., 496; *Clark vs. Wilson*, 103 Mass., 221.

j. In case of parties having a qualified title or interest, like that of a carrier

or bailee, the measure of damages is the interest of the insured in the goods, unless entitled to recovery as trustee for the owner.

Savage vs. Corn Exchange Ins. Co., 36 N. Y., 655; *Ayers vs. Hartford Ins. Co.*, 17 Iowa, 176; *Deforest vs. Fulton Ins. Co.*, 1 Hall (N. Y.), 84.

k. In marine insurance, the value is to be estimated as at the time and place of adjustment or sale.

Clark vs. United F. & M. Ins. Co., 7 Mass., 365; *Lee vs. Grinnell*, 5 Duer, 400.

l. The value may also properly be measured by that at the port where the voyage commenced, with a proper reduction for wear and tear.

Gray vs. Walw., 2 S. & R., 229; *Mutual Safety Ins. Co. vs. Cargo of Ship George*, Olcott Adm., 157.

m. The value of goods is usually that which they had at the place of lading, or their invoice value.

Coffin vs. Newburyport M. Ins. Co., 9 Mass., 436; *Minturn vs. Col. Ins. Co.*, 10 Johns., 273.

n. Damage resulting from removal of goods in the face of an impending conflagration, is within the policy, if the danger be so great and imminent as to justify the removal, even though the building be not burned.

White vs. Republic F. Ins. Co., 57 Me., 91; *Case vs. Hartford F. Ins. Co.*, 13 Ill., 676; *Holtzman vs. Franklin F. Ins. Co.*, 4 Cranch, 293; *Hillier vs. Alleghany Co. Mut. Ins. Co.*, 3 Penn. St., 470.

See further on this subject under ADJUSTMENT, BUILDING, CONTRIBUTION, EXPLOSION, GENERAL AVERAGE, INSURABLE INTEREST, LOSS, REPAIRS, REPLACEMENT, SUBROGATION, VALUATION, VALUED POLICY.

DIGEST OF RECENT CASES.

HOW TO BE ESTIMATED.

1. Wines in distillery warehouse lost before duty is paid, are to be valued only at price less the tax, in case of loss, when the owner was only liable upon removal of the bond.

Security Ins. Co., vs. Farrell, Ill. S. C., 2 Ins. Law Jour., 302.

2. The measure of damage is the value of goods destroyed at the time of fire, not exceeding the sum insured.

Murphrey & Co. vs. Old Dominion Ins. Co., U. S. C. C., 5 Ins. Law Jour., 297.

3. The market value of the goods at the time and place of fire is the proper measure of damages within the amount insured.

May on Ins., 525 *et seq.*; *Wynne vs. L. L. & G. Ins. Co.*, 71 N. C. Rep., 121,

Fowler vs. Old North State Ins. Co., N. C. S. C., 74 N. C., 89; 6 Ins. Law Jour., 432.

4. The Wisconsin statute of 1874, providing that in insurance on real property, in case of a total loss, the amount written in the policy shall be taken and deemed the true value of the property at the time of such loss, and the amount of the loss, and that such amount shall be taken and deemed the measure of damages, does not merely make the amount written *prima facie* evidence of the damage; it must be regarded as if written in the policy itself, and any policy provision conflicting with the statute must fail. Where the policy provided that the loss or damage should be established according to the true and actual cash marketable value of the property at the time of loss; *Held*, in a case of total loss, that the stipulation being in conflict with the statute, must fail. The measure of damages being fixed by the statute, the company has no right to show that the loss is less than the amount written in the policy.

Case of Farmers' Ins. Co. vs. Curry, 10 Ch. L. N., 43, excepted to. White vs. Conn. Mut. Life Ins. Co., U. S. C. C. Mo.; Emmory vs. Piscataqua F. & M. Ins. Co., 52 Maine, 322; Chamberlain vs. Ins. Co., 55 N. H., 249; Sedgwick on Cons. of St., p. 70; Luce vs. Dorchester Ins. Co., 105 Mass., 297; Brown vs. Quincy Ins. Co., id., 396.

Reilly et al. vs. Franklin Ins. Co., Wis. S. C., 43 Wis. 449; 7 Ins. Law Jour., 391.

5. In a marine risk proof of damage by water is *prima facie* proof of damage by perils of navigation. Reception of goods from a carrier does not discharge the insurer, and is evidence that damage did not occur in course of navigation. Damage from water in consequence of improper stowage, unless occasioned or acquiesced in by insured, is damage from the perils of navigation. Insured after selecting a proper carrier does not warrant diligence of carrier, or that of any other person through whom the consignment passes.

Underwriters' Agency vs. Sutherlin, Ga. S. C., 55 Ga. R., 266.

6. Where formal demand for payment has been refused, plaintiff is not estopped from claiming greater damages than had been notified to them before, and consisting of items which had been overlooked.

Kraus & Co. vs. Balt. Ins. Co. et al., Balt. (Md.) Superior Court.

7. The policy provided that the insured should not have the right to abandon if repair was practicable, and also unless such damage should equal fifty per cent of agreed value of the boat. *Held*, that neither under the English nor American rule, to ascertain the value after repair, could a deduction of one-third new for old be made, nor was the agreed, but the actual value to be regarded for this purpose.

5 Peters, 604 ; 12 Peters, 378 ; 11 Ohio, 147.

Memphis & Arkansas River Packet Co. vs. Peabody Ins. Co., Cinn., (O.) Superior Court.

8. The owner insured for £1,200 on a ship valued in the policy at £2,600. The work necessary to repair the sea damage done, cost, after the usual allowance of one-third new for old timber, together with certain particular average charges covered by the policy, the sum of £3,178. In addition to this, the plaintiff, the owner, had to pay £519 for salvage services and general average expenses. The value of the ship at the commencement of the risk was £3,000, and her value on her return to port in her damaged state was £998. Being an old ship, the effect of the extensive repairs done was to make her a very much stronger and better ship than she was before the damage, and after having been metaled, which she was not before, at a cost of £695, and having new works done at a cost of £500, neither of which sums would be charged against the underwriter, she was worth £7,000. The defendant paid a certain sum into court, and the question was whether he was liable for the whole amount claimed. *Held*, that the loss was not to be estimated by the depreciation of the ship as a salable chattel. The fact that the owner happens to be in a better condition than if the accident had not happened, cannot be taken into account. The measure of damage must be estimated from the cost of repairs, with the proper allowance of new for old.

Lohre vs. Aitchinson, Eng. High Ct. of Justice, 6 Ins. Law Jour., 878.

9. The insured premises were desired for a street and the price had been fixed by the arbitrator and accepted, but before conveyance they were burned. *Held*, that the insured was entitled to

recover the whole sum and not merely the value fixed upon the building for the purpose of pulling it down, the bargain not having been executed, otherwise the insured would be compelled to rely on the solvency of the purchaser.

Collingridge vs. Royal Exchange, Eng. Q. B. L. R., 3 Q. B. D.

See Cross Index for other cases bearing on MEASURE OF DAMAGES.

MECHANIC'S LIEN.

See INCUMBRANCE, INSURABLE INTEREST.

See Cross Index for cases bearing on MECHANIC'S LIEN.

MERCHANDISE.

See GOODS and MERCHANDISE.

MILITARY POWER.

DIGEST OF RECENT CASES.

MILITARY POWER—CONSTRUCTION OF.

1. The policy was issued on the store of the plaintiff in Glasgow, Missouri. At the time of the fire the city was occupied by the Federal troops as a military post, but was surrounded and attacked by a superior force of the Confederate army. In order to prevent the military stores of the Federal army from falling into

the hands of the enemy, who were gaining possession of the place, the Federal commander ordered the City Hall to be set on fire; and the flames from it, through two other intermediate buildings, were communicated to the store of the plaintiffs, which was consumed, including the goods insured by the defendant's policy. The policy contained the agreement that "the company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power." *Held*, that the fire was not the act of the rebels, nor was there any ground of inference that the property would have been burned by them if they had been allowed to capture it. The burning of the City Hall was a lawful discretionary act on the part of the United States, and not the physical result of any agency of the rebels, but was an act which they would have prevented if they could. The military necessity was the motive for burning the City Hall, which was done in the exercise of military discretion. This was the efficient means of the fire, which intervened between the acts of the rebels and the fire itself, and without which the fire would not have happened. There was here the intervention of a new affirmative power or force, other than the acts of the rebels, and was the actual means by which the fire happened.

Insurance Co. vs. Tweed, 7 Wallace, 52.

The word "military" in the proviso had no reference to the lawful acts of the military power of the government while attempting to suppress an invasion or rebellion. The term "military or usurped power" is limited to the interference with the public safety by organized force from abroad, or domestic rebellion culminating in actual or formal usurpation of governmental authority, and hostile to the lawful government, and has no reference to the lawful acts of the government in putting down rebellion or preserving the public peace.

Ellis on Insurance, p. 41; *Marshall on Insurance*, p. 791; *Drinkwater vs. London Assurance Corporation*, 2 Wilson, 363; *City Fire Ins. Co. vs. Corlies*, 21 Wend., 367; *Sprull vs. North Carolina Ins. Co.*, 1 Jones, N. Car. Law R., 126.

Boon vs. Aetna Ins. Co., U. S. C. C., 4 Ins. Law Jour., 27.

See *Ætna Ins. Co. vs. Boon*, U. S. S. C., elsewhere, and under **WAR**.

See Cross Index for other cases bearing on **MILITARY POWER**.

MILL.

See **FACTORY**.

See Cross Index for cases bearing on **MILL**.

MISTAKE.

See **AGENT, APPLICATION, CONCEALMENT, DESCRIPTION, REFORMATION, REPRESENTATION, WARRANTY**.

See Cross Index for cases bearing on **MISTAKE**.

MOB.

See **MILITARY POWER, RIOT, WAR**.

See Cross Index for cases bearing on **MOB**.

MORTGAGE.

ABSTRACT OF THE LAW.

a. A mortgage is not an alienation within the policy.

Holbrook vs. American Ins. Co. 1 Curtis C. C. U. S., 163; *Ayers vs. Hartford Ins. Co.*, 21 Iowa, 23.

b. But a mortgage is an incumbrance which will avoid the policy if so stipulated.

Eiles vs. Hamilton Ins. Co., 3 Allen (Mass.), 362.

c. A mortgage has been held an alienation of the ownership within the policy.

Edwards vs. Mut. Safety Co., 1 Allen, 311.

d. A sale and mortgage back to secure the purchase money has been held not to change the title.

Kitts vs. Ins. Co., 56 Barb. (N. Y.), 177.

e. But the effect of a mortgage depends strictly upon the terms used in the contract with reference to it.

Compare *Maclaren vs. Hartford Mutual F. Ins. Co.*, 5 N. Y., 551; *Lawrence vs. Holyoke*, 11 Allen (Mass.), 387; *Edes vs. Hamilton Ins. Co.*, *supra*; *Hill vs. Cumberland Protection Co.*, 59 Penn. St., 474.

f. A mortgage of chattels, with transfer of possession, is alienation.

Phoenix Ins. Co. vs. Lawrence, 4 Met. (Ky.), 9.

g. Foreclosure of mortgage operates as an alienation.

McIntyre vs. Norwich F. Ins. Co., 102 Mass., 231; *McLaren vs. Hartford F. Ins. Co.*, 1 Seld. (N. Y.), 151.

h. Whether a mortgage is a change of title, and when, the courts are not agreed.

Jackson vs. Mass. Mut. F. Ins. Co., 23 Pick. (Mass.) 418; *Smith vs. Monmouth Mut. F. Ins. Co.*, 50 Me., 96; *Folsom vs. Ins. Co.*, 10 Fost. (N. H.), 231; *McCulloch vs. Ins. Co.*, 8 Black, 50; *Western Mass. Ins. Co. vs. Riker*, 10 Mich., 279.

i. A sale, absolute in form, but intended simply as a mortgage, is not an alienation, but it has also been held to be a transfer of change of title.

Hodges vs. Ins. Co. 4 Seld. (N. Y.), 416; *Holbrook vs. Ins. Co.*, 1 Carter (U. S. C. C.), 193; *Western Mass. Ins. Co. vs. Riker*, *supra*.

See further on this subject under ALIENATION, INCUMBRANCE, MORTGAGOR AND MORTGAGEE, POLICY, TITLE.

DIGEST OF RECENT CASES.

MORTGAGE—WHEN IT DOES NOT WORK A FORFEITURE.

1. The policy required the disclosure of any incumbrance at the time of accepting the risk. A mortgage on the property was not communicated to the company in connection with the policy, but subsequently another policy was issued upon the same property to the same parties, loss payable to mortgagees; after this the policy in suit was renewed. *Held*, that this was evidence sufficient to warrant the jury in finding that the company had knowledge of the mortgage.

People's Ins. Co. vs. Spencer, 3 P. F. Smith, 353; *Eureka Ins. Co. vs. Robinson*, 6 P. F. Smith, 256.

State Ins. Co. of Mo. vs. Todd, Pa. S. C., 83 Pa., 212; 6 *Ins. Law Jour.*, 893.

2. Where the policy and by-law require a disclosure of incumbrances to obtain a new policy, and do not require a disclosure of incumbrances to obtain an extension, and an incumbrance is created after the policy, and the agent of the insurer in pursuance of his authority extends the policy, failure to disclose such incumbrance will not avoid the policy.

Fayette Co. Mut. F. Ins. Co. vs. Neel, assignee, P a. S. C., 8 Ins. Law Jour., 265.

3. The policy provided that it should be void if all the liens of whatever kind were not disclosed. *Held*, that interest accrued, but not due, on a mortgage, was not a lien within the meaning of the policy. A judgment lien was not disclosed, but when the policy was renewed it had been paid. The renewal stipulated that it should be regarded as continued under the original contract, and should be void in case of any change in the risk not made known. The certificate of renewal contained the words "provided always that the original policy is in full force." *Held*, that the judgment lien not existing at the time of renewal, there was no forfeiture. *Held*, that subsequent insurance procured by a mortgagee in his own name without the knowledge of or consent of the mortgagor, where the mortgage stipulates that he may procure such insurance and add it to the mortgage debt in default of the mortgagor insuring for his benefit, is not other insurance within the meaning of a policy insuring the mortgagor with loss payable to mortgagee. *Held*, that an indorsement of loss payable to the mortgagee, is not a waiver of a stipulation that the policy shall be void in case foreclosure proceedings are begun. The company, while willing to protect the mortgagee's interest, may be unwilling to assume the risk attendant on foreclosure. *Held*, that the objection to such foreclosure proceedings is waived by the company, after a knowledge of the fact, requiring the insured to submit to an examination in accordance with the provision of the policy, such requirement being an election to treat the policy as valid; such waiver need not be based on any new agreement or an estoppel. An innocent misstatement is not within a policy provision making it void in case of fraud or misrepresentation.

Citing *Pratt vs. Cent. Ins. Co.*, 55 N. Y., 505; *Allen et al. vs. Vermont Mut. Ins. Co.*, 12 Vt., 366; *Webster vs. Phoenix Ins. Co.*, 36 Wis., 67; *Gans vs. St.*

Paul Ins. Co., 43 id., 109; Ins. Co. vs. Norton, 96 U. S. Sup. Ct., 234; Goodwin vs. Mass. Mut. L. Ins. Co., 73 N. Y., 480, 493; Prentice vs. Knickerbocker Life Ins. Co., 77 N. Y., 423; Brink vs. Hanover F. Ins. Co., N. Y. C. A. (9 Ins. L. J.); Taylor's Landlord and Tenant, 5 Ed., Sec. 287, 497; 1 Smith's Lead Cas., 20a. Lloyd vs. Grispe, 5 Taunt., 249; Doe vs. Miller, 2 C. and P., 348.

Titus vs. Glens Falls Ins. Co., N. Y. C. A., 81 N. Y., 410; 9 Ins. Law Jour., 664.

4. It was a condition of the policy that, "If the property be sold or transferred, or any change take place in the title, either by legal process or otherwise, * * * * without the consent of the company, the policy shall be void." This condition was not broken by the execution of a mortgage on the property, without such consent.

Ins. Co. vs. Spankneble, 54 Ill., 53; Aurora Fire Ins. Co. vs. Eddy, 55 Ill., 213; May on Ins., sec. 269, and cases in notes.

Byers vs. Farm. Ins. Co., Ohio S. C., 35 O., 606; 9 Ins. Law Jour., 743.

5. The property insured was a general stock of goods, and was owned by T. and not by the plaintiff, J. and the policy was issued to T. Previous to the fire and while the policy was in force, T. became indebted to sundry persons on sundry notes, which he describes, and the plaintiff signed or indorsed all of said notes as surety for T., and T. promised to keep said stock of goods insured for the benefit of the plaintiff. It was alleged that T., to indemnify plaintiff against loss on account of said notes, gave him a chattel mortgage on the goods in the store, describing them. It was further alleged that T. had been indebted also to sundry other persons for which the plaintiff became surety to the creditors, and took another chattel mortgage on the goods to indemnify him, and that at the time of the signing of said obligations as surety, and receiving said chattel mortgage, T. informed plaintiff that he had policies of insurance on said property, naming the policy sued on as one, and said that he would hold the said policy of insurance for the use and benefit of plaintiff, and would cause the same to be renewed, and keep the property insured for the plaintiff's indemnity. It appears that plaintiff had to pay the said debts, and that there was due to him on that account \$3,287, besides interest. L., after the loss, transferred to the plaintiff the policy

in consideration of the premises, and authorized plaintiff to collect the full amount of the loss of which defendant had notice. *Held*, that the giving of the chattel mortgage was not a violation of the conditions of the policy against any assignment of the policy, or any interest therein, without consent of the company.

Prows vs. Ohio Valley Ins. Co., Sup. Ct. of Cincinnati, 4 Ins. Law Jour., 639.

GENERALLY.

6. The K. Insurance Company issued a fire insurance policy of \$1,000 to C., on his interest in a certain building. After the destruction of the building by fire, and the accruing of a liability on the policy, the company, for the consideration of \$1 and its due-bill for \$500, bought a mortgage of \$1,000 on the premises, for the payment of which C. was bound, and sought to offset the mortgage against the policy. C. at the time was insolvent, and the premises after the fire no security for the mortgage. *Held*, that the circumstances warranted a finding that the company purchased the mortgage not as an investment of its funds, but simply for the purpose of offsetting the policy, and that under section 29 of chapter 93 of Laws 1871, page 235, of Kansas, which authorizes fire insurance companies to "invest their capital and funds accumulated in the course of business in bonds and mortgages," such an insurance company has no power to purchase upon credit the mortgage obligation of one insured by the company, and entitled to indemnity for a loss, for the purpose of setting off such mortgage against the policy.

Dartmouth College vs. Woodward, 4 Wheat., 518; Smith vs. Alabama L. Ins. & T. Co., 4 Ala. N. S., 558; Ins. Co. vs. Ely, 5 Conn., 560; F. & M. Bank vs. Baldwin, Sup. Ct. of Minn., Alb. L. J., 1876, p. 391; Strauss vs. Eagle Ins. Co., 5 O. St., 59.

Kansas Ins. Co. vs. Kraft, Kan. S. C., 6 Ins. Law Jour., 587.

See Cross Index for other cases bearing on MORTGAGE.

MORTGAGOR AND MORTGAGEE.

ABSTRACT OF THE LAW.

a. Both mortgagor and mortgagee may insure independently, the former to the full value of the property, and the latter to the full extent of his interest.

Columbia Ins. Co. vs. Lawrence, 10 Pet., 512; *Traders' Ins. Co. vs. Roberts*, 4 Wend., 402; *Wilson vs. Hill*, 3 Met., 68; *Fox vs. Phoenix Ins. Co.*, 52 Me., 333.

b. Insurance by mortgagor inures to the benefit of the mortgagee, where, by agreement with the latter, the insurance was in part or in whole for his benefit.

Cromwell vs. Brooklyn Ins. Co., 44 N. Y., 42; *Smith vs. Packard*, 19 N. H., 575.

c. A mortgagee cannot insure at the expense of mortgagor, except by special agreement.

White vs. Brown, 2 Cush., 416.

d. A mortgagee is not obligated to state the special character of his interest unless called for; but when called for, must do so correctly.

Norwich Fire Ins. Co. vs. Boomer, 52 Ill., 442.

e. In case of insurance by the mortgagee independently of the mortgagor, the insurer is entitled to subrogation.

Ins. Co. vs. Woodruff, 2 Dutch. (N. J.), 541; *Kernochan vs. N. Y. Bowery Ins. Co.*, 17 N. Y., 428; *Carpenter vs. Providence Washington Ins. Co.*, 16 Pet., 495.

f. The decisions on this point, however, are not uniform.

King vs. State Mutual F. Ins. Co., 7 Cush., 1; *Concord Mutual Ins. Co. vs. Woodbury*, 45 Me., 452; *Honore vs. Ins. Co.*, 51 Ill., 409.

g. When the mortgagor is liable for the premium paid by the mortgagee on insurance in the name of the latter, the mortgagor is entitled to have the money applied in payment of the mortgage debt.

Kernochan vs. Ins. Co., *supra*; *Concord Union Mutual F. Ins. Co. vs. Woodbury*, *supra*.

h. Payment of mortgage debt before the loss, operates to extinguish the policy, but otherwise when payment has been made subsequent to the loss.

King vs. State Ins. Co., 7 Cush., 1; *Kernochan vs. Ins. Co.*, *supra*.

i. Insurance generally, by the mortgagee, entitles him to recover the whole amount, holding any surplus for the benefit of the mortgagor; but insurance specified to be upon his own interest, limits recovery to the extent of that interest.

Ins. Co. vs. Updegraff, 9 Harris, 513; *Thornton vs. Ins. Co.*, 21 P. F. Smith (Pa.), 234.

j. Such special insurance by the mortgagee, requires the accurate description of his interest including prior incumbrances.

Smith vs. Columbia Ins. Co., 5 Harris, 253; *Addison vs. Louisville Ins. Co.*, 7 B. Mon. (Ky.), 470.

See further on this subject under ALIENATION, INCUMBRANCE, MEASURE OF DAMAGES, MORTGAGE, OTHER INSURANCE, POLICY, REPLACEMENT, SUBROGATION, TITLE.

DIGEST OF RECENT CASES.

MORTGAGOR AND MORTGAGEE—WHEN THE POLICY IS IN THE NAME
OF MORTGAGOR.(a) *When recovery can be had.*

1. The policy was issued in the name of the owner, payable to the mortgagee to the extent of his interest. After the fire the foreclosure of the mortgage was completed. *Held*, that the mortgagee had a right to recover the amount remaining due on the mortgage, and can maintain an action in his own name.

Hadley vs. N. H. Ins. Co., N. H. S. C., 55 N. H., 110; 4 Ins. Law Jour., 611.

2. The loss was payable to M., the mortgagee, as her interest should appear. M. had a mortgage for \$500 on the house. The insurance on house and furniture was \$3,000. The loss on furniture was paid to M., but the company elected to rebuild the house. *Held*, that the interest of the mortgagor in the policy being in excess of the mortgage, he had a right to sue in his own name to recover the alleged difference in value between the new and the old house.

St. Paul F. & M. Ins. Co. vs. Johnson., Ill. S. C., 77 Ill., 598; 6 Ins. Law Jour., 434.

3. The premium was paid to the agent for the renewal of a policy by A., loss payable to W. to the extent of his interest as mortgagee, and a renewal receipt taken. The company, by mistake, instead of renewing, made out a new policy to W. as owner, which fact was undiscovered until after the loss, when, with the consent of A., the company paid to W. the amount of his interest. *Held*, that A. was entitled in a suit at law to recover the balance due above the mortgage.

McCulloch vs. Ins. Co., 1 Pick., 277; Lightbody vs. North American Ins. Co., 23 Wend., 18; State Fire Marine Ins. Co. vs. Porter, 3 Grant, Pa. Cases, 123; Eureka Ins. Co. vs. Robinson, Rea & Co., 56 Pa. St., 256; Benjamin vs. Saratoga Mut. Fire Ins. Co., 17 N. Y., 415; Audubon vs. Excelsior Ins. Co., 27 N. Y., 216; Kohne vs. Ins. Co. of North America, 1 Wash., 93; American

Horse Ins. Co. vs. Patterson, 23 Ind., 17 ; New England Fire & Marine Ins. Co. vs. Robinson, 25 Ind., 536 ; Flanders on Fire Ins., 118.

Akin vs. L. L. & G. Ins. Co., U. S. C. C. Ark., 6 Ins. Law Jour., 341.

4. A building mortgaged to H. for \$14,000, was insured by S., the owner, for his own benefit for \$4,000 in the L. company, and \$10,000 in the W. company. The W. company, at the request of the parties, subsequently indorsed on its policy, Loss, if any, payable to H., mortgagee, and affixed the usual mortgage clause agreeing that the mortgagee's interest should not be invalidated by any act of the mortgagor, etc., and providing that whenever the company should pay the mortgagee any sum for loss, and claim that no liability existed as to the mortgagor, it should be subrogated to the mortgagee's right of recovery, or at its option might pay the whole amount of the mortgage and take an assignment of the whole. The damage was \$9,000, and the L. company paid its proportion, four-fourteenths, to the owner. In a suit by mortgagee to recover the whole amount from the W. company; *Held*, that the mortgage clause created a new contract with the mortgagee, not in the nature of an assignment, but as an independent party entitled to the full amount of insurance without regard to the owner, and renders such mortgagee a party having distinct interests separate from the owner, embraced in another and a different contract.

Cases of Grosvenor vs. Atlantic Fire Ins. Co. of Brooklyn, 17 N. Y., 391; Buffalo Steam Engine Works vs. Sun Mutual Ins. Co., id., 401; Frink vs. Hampden Ins. Co., 31 How., 30; 45 Barb., 348; Cone vs. Niagara Fire Ins. Co., 3 N. Y. S. C. (T. & C.) R., 33, 39; Merwin vs. Star Fire Ins. Co., 7 Hun., 659, affirmed in Court of Appeals; May on Fire Ins., 460; Flanders on Fire Ins., 442, distinguished. Excelsior Fire Ins. Co. vs. Royal Ins. Co., 55 N. Y., 343; Springfield Ins. Co. vs. Allen, 43 N. Y., 392.

Held, that the provision that the policy shall not be invalidated, etc., does not mean that it shall not become void, but that it shall continue valid for the full amount named. *Held*, that a requirement that the mortgagees should give notice of any change in the risk within their knowledge, does not conflict with this view. *Held*, that the provision regarding subrogation does not indicate that only the owner's interest was insured, but rather indicates an intention to exonerate the mortgagee from the application of

the provision regarding other insurance. *Held*, that the mortgagee was entitled to recover the full amount of the loss, and this right was not interfered with by the provision that the company should only be liable for its proportion. On any other principle the plaintiff would be unable to recover the amount of his loss, since he has no claim on the L. policy.

Weyman vs. Prosser, 36 Barb., 363; *Carpenter vs. Providence Ins. Co.*, 16 Peters, 495; *Columbian Ins. Co. vs. Lawrence*, 10 Peters, 507-512; *McDonald vs. Black*, 20 Ohio, 185. *Case of Mayor, etc., vs. Hamilton Fire Ins. Co.*, 39 N. Y., 45, distinguished.

Hastings vs. Westchester Fire Ins. Co., N. Y. C. A., 73 N. Y., 141; 7 *Ins. Law Jour.*, 430.

5. Where a fire insurance policy was payable to a mortgagee as his interest may appear: *Held*, that the rights therein were not cut off by the death of the insured, notwithstanding such policy contained a provision rendering the same void in case of change in the title. Where proofs of loss are furnished a reasonable time before the expiration of a stipulated limitation for bringing an action upon a policy of insurance, the company cannot retain them until after that time without action, and then, on refusal to pay, insist upon the limitation. In an action upon an insurance policy for the use and benefit of a mortgagee, to whom the same was payable to the extent of his mortgage interest, by an administrator of insured: *Held*, that the objection that the administrator could not bring the action, as the title to real estate was in heirs or devisee, was of no force.

Citing *Watertown Ins. Co. vs. Grover, etc., S. M. Co.*, 41 Mich., 136.

Westchester F. Ins. Co. vs. Dodge, Mich. S. C., 9 *Ins. Law Jour.*, 909.

6. When a party borrowing money in pursuance of the terms of his deed of trust to secure its payment, procured a policy of insurance on the buildings on the premises conveyed, in terms to himself, but which contained a clause, that in the event of a loss, the money due for the same should be paid to the trustee for the lender, and the mortgage clause in the policy provided that when the insurance company should pay the holder of the note any sum for loss, and should claim that as to the mortgagor no liability existed, the company should at once be legally sub-

rogated to all the rights of such holder under all the securities held as collateral to the debt to the extent of such payment, or at its option might pay the holder the whole principal due, with interest, and should thereupon receive a full assignment and transfer of the securities held as collateral to the debt. *Held*, that this was an express contract with the creditor of the assured, and that to the extent of the debt secured by the deed of trust the creditor had an interest distinct from that of the owner of the property, and that any loss to that interest accruing under the policy, was payable to the trustee for the use of the holder of the note, and that he might maintain an action for the same in his own name. The owner of property procured a policy of insurance on the buildings thereon in his own name, for his own benefit, and for the benefit of a bank to whom he had on the same day given a note for money loaned to him, secured by deed of trust on the same property, which deed required him to insure the same as a further security. The policy provided, that in case of loss, the insurance company should pay the amount of the loss to the trustee in the trust deed for the bank or holder of the note; that the owner, the mortgagor, might reinsure upon condition that he should not be entitled to recover of the company "any greater proportion of the loss or damage than the amount" insured by the policy bore to the whole sum insured; and that in case of damage to the property, not totally destroyed, unless the amount of such damage was agreed upon between the assured and the company, it should be appraised by disinterested and competent persons mutually agreed upon by the parties. The mortgage clause in the policy provided that the insurance, as to the trustee or successors only, should not be invalidated by any act or neglect of the mortgagor or owner of the property, nor by the occupation of the premises for purposes more hazardous than were permitted by the policy, only requiring him or the holder of the note to notify the company of any change of ownership or increase of hazard which should come to his knowledge, and to pay for such increase of hazard on reasonable demand, if the owner should refuse to pay the same, according to the established scale of rates. The owner of the property afterwards procured four additional policies on

the same property, payable to himself and wife alone, in which the bank had no interest: *Held*, that the owner and the bank held distinct interests under the policy, it being in substance two contracts; that the owner in a suit on the policy for a loss would be limited to a recovery of the *pro rata* share of the company when prorated with the amounts of the subsequent policies, and would be bound by his act of submitting the amount of damages to appraisal; but the bank in a suit by it or its trustee would not be limited to a recovery of the insurance company's prorated share with the four companies issuing the subsequent policies; nor would it be bound by the selection of appraisers in which it did not join. It having no control over the acts of the mortgagor, was not bound by his acts or neglect.

Hartford F. Ins. Co. vs. Olcott, Ill. S. C., 10 Ins. Law Jour., 564.

7. Where a mortgagor procures a policy of insurance covering his interest, and containing a clause appointing the damages in case of loss to be paid to the mortgagee, and an action is subsequently brought against the mortgagor and a subsequent mortgagee and others, to subject the mortgaged property, and the prior mortgagee obtained satisfaction out of the proceeds of the sale, a clause in the final judgment declaring the subsequent mortgagee to be subrogated to the rights of the former one under the policy, is conclusive as against the insurer of the title of such subsequent mortgage to sue upon the policy, and enforce all the rights of the prior mortgagee. Such appointment does not affect any change in the terms of the policy. It does not become an insurance of the interest of the mortgagee, but continues to be an insurance of the interest of the mortgagor only. It is still a contract between the mortgagor and the insurer, and all the provisions of the policy continue in force. The delivery in such a case of the policy to the appointee, and the subsequent acceptance by the insurer of the promissory note of the insured for the premium, payable in bank at a future day to the order of the insurer, is a payment of the premium, and a performance of a condition in the policy providing that the policy shall not become binding until the payment of such premium, if such be, as in this case, the intention of the parties. A clause in a policy reserving to the insurer the power

to terminate the insurance, on giving notice and tendering a *pro rata* proportion of the premium for the unexpired term, is a provision in the nature of a forfeiture, and its conditions must be strictly observed. The right of a mortgagor of chattels or of real estate to redeem against the mortgagee, is a title to such property, and any subsequent change occurring before the loss which terminates the right to redeem, and takes away the possession and control of the mortgagor, is a change of title within a condition in a policy of insurance providing for a forfeiture of the policy in the event of any transfer or change of title. An assignment by an insolvent debtor in trust for the payment of his debts, executed in conformity to the statutes of this State, to the assignee, or a substitute appointed for him by the Probate Court accepting the trust, is a transfer of the title of the assignor, operating as a forfeiture of a policy of insurance containing the provision above referred to. At the time of the assignment judicial proceedings were pending against the assignors and others for the foreclosure of mortgages covering all the property included in the assignment, notwithstanding which the assignment took effect and became operative as an alienation of the title of the assignors, so as to terminate the policy.

Little vs. Eureka Ins. Co., Cinn. (O.) Superior Court, 5 Ins. Law Jour., 154.

8. The policy provided that in case of other insurance without consent, or of a mortgage, or transfer, or sale of the property, without notice indorsed, it should be void; also, that in case of other insurance, the insured should recover only a *pro rata* amount of the loss; also, that no sale or transfer of the property should vitiate the right of the mortgagee to recover. The loss was payable to the mortgagee. The insured subsequently placed a second mortgage on the property without consent, which was foreclosed by the mortgagee, who procured additional insurance without consent. *Held*, in a suit by the first mortgagee to recover, that the clauses relating to other insurance were not intended to defeat the rights of parties by the acts of strangers for which they were not responsible.

Nichols vs. Fayette Mut. F. Ins. Co., 1 Allen, 63.

Held, that the second mortgage, without consent, defeated the right of the insured, and of the mortgagee, if merely standing in his place, to recover.

Franklin Savings Institution vs. Central Ins. Co., 119 Mass., 240.

But under the special clause protecting the mortgagee, its right of recovery is not vitiated by any of the incidents of a sale or transfer. *Held*, that the pro rata clause was not intended to cover unauthorized acts of a stranger, and the mortgagee is entitled to recover the full amount of the loss within the policy. *Held*, that a statement in the proof of loss that there was other insurance is not the admission of a fact contradicted in the claim, and does not prevent a full recovery.

Campbell vs. Charter Oak F. & M. Ins. Co., 10 Allen, 213, distinguished.

City Five Cent Savings Bank vs. Pa. Fire Ins. Co., Mass. S. J. C., 122 Mass., 165; 6 Ins. Law Jour., 437.

WHEN NO RECOVERY CAN BE HAD.

9. The owner of a block of buildings insured against loss by fire, agreed to mortgage them to G. N. as security for a loan of money. A mortgage was thereupon executed, but by mutual mistake of the parties, the premises insured and agreed and intended to be mortgaged, were incorrectly described therein. As further security for the loan the mortgagor assigned to the mortgagee the policy of insurance, and procured a memorandum to be written on it as follows: "Payable in case of loss to G. N. to the extent of his claim." The insured premises were destroyed by fire, the mortgage debt remaining unpaid, and the mortgagee brings this action against the mortgagor and the insurance company for a reformation of the mortgage.

Held, that the action will not lie against the company, for the reason, first, that it has no interest in the subject matter of the action; and second, that there is no question between the plaintiff and the company.

Newman vs. Home Ins. Co., S. C. Minnesota, 4 Ins. Law Jour., 237.

10. In an action on a policy of insurance on the property of

A., "payable in case of loss to B., mortgagee," containing the condition that if the assured's interest was other than "free and unincumbered, and is not so expressed in the written portion of the policy, then and in every such case this policy shall be void," it appeared that the property was subject to another mortgage to C., which was not stated in the policy. There was evidence that B. first obtained a policy on his interest as mortgagee from the company's agent, but, on the company's refusal to carry the risk in that form, accepted the policy in question on the assurance of the agent that he would be equally safe. *Held*, that the policy was void, and that the evidence was incompetent, and did not show that any other than A.'s interest was insured.

Fitchburg Savings Bank vs. Amazon Ins. Co., Mass. S. J. C., 125 Mass., 431.

11. Where a building is insured against fire by a policy which provides that "if the assured shall vacate the property in whole or in part, this policy shall be void; this company will not insure unoccupied property," and an indorsement is made upon the policy by which it is to be payable in case of loss or damage to mortgagees of the insured property "as their mortgage claim may appear," and the property is afterwards destroyed by fire, when unoccupied, the policy is void, both as to the original assured and the mortgagees.

Franklin Savings Institution vs. Central Ins. Co., Mass. S. J. C., 119 Mass., 240.

12. The policy, a New Hampshire contract, provided that in case of other insurance by insured without consent, it should be void. The policy insured C., payable in case of loss to S. the mortgagee, as his interest might appear. S. procured the policy and paid the premium without consulting the mortgagor, through a sub-agent, the agent who issued the policy not knowing who procured it, or paid the premium. C. afterward procured insurance in his own behalf. *Held*, that the decisions of a State court, except upon points arising under a statute, are not binding on U. S. courts in ascertaining the meaning and effect of an insurance

contract. But the law of the State will govern in so far as the right to maintain action at common law is concerned, and the law of New Hampshire permits action by the mortgagee when he has paid the premium.

Carpenter vs. Providence Ins. Co., 16 Pet., 501; *Chamberlain vs. N. H. Ins. Co.*, 55 N. H., 249.

Held, that the equitable right of the mortgagee under such a contract, is liable to be defeated by acts of the mortgagor. The phrase "as his interest may appear," does not affect this question, it simply prescribes the extent of payment to him.

Bates vs. Equitable Ins. Co., 3 Clifford, 215; 10 Wall., 33; *Johnson vs. North British Co.*, 1 Holmes, 111.

Held, that the party insured was the mortgagor, and the construction is not affected by the fact that the policy was procured by the mortgagee in the absence of any special agreement with the company to insure the mortgagee.

Franklin Sav. Inst. vs. Cent. Mut. Co., 119 Mass., 240; *Foote vs. Hartford Fire Ins. Co.*, id., 259. *Graves vs. Boston Ins. Co.*, 2 Cranch, 419; *Woodbury Savings Bank vs. Charter Oak Ins. Co.*, 29 Conn., 374; *Livingstone vs. Western Ins. Co.*, 16 Grant Ch., 9. Distinguishing *Chamberlain vs. N. H. Ins. Co.*, 55 N. H., 249; *Foster vs. Equitable Mut. Ins. Co.*, 2 Gray, 216.

Sias vs. Roger Williams Ins. Co., *U. S. C. C. N. H.*, 9 *Ins. Law Jour.*, 154.

13. M. was insured on her dwelling-house, which was already mortgaged to the plaintiffs, the conditions broken and proceedings commenced for foreclosure, of which the defendant insurance company had no notice. By a clause in the policy, the insurance was "payable in case of loss to the plaintiffs to the amount of the mortgage held by them." The policy stipulates, "if the property be sold or transferred, or any change take place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance * * then * * this policy shall be void." *Held*, that the insurance was upon the property of M., and not upon the interest of the plaintiffs as mortgagees.

Fogg vs. Middlesex Mut. Fire Ins. Co., 10 Cush., 337; *Sanford vs. Mechanics' Mut. Fire Ins. Co.*, 12 Cush., 541; *Jackson vs. Farmers' Mut. Fire Ins. Co.*, 5 Gray, 52; *Hale vs. Mechanics' Mut. Fire Ins. Co.*, 6 Gray, 169; *Loring vs. Manufacturers' Ins. Co.*, 8 Gray, 28; *Turner vs. Quincy Ins. Co.*, 109 Mass., 563; *Franklin Savings Institution vs. Central Mut. F. Ins. Co.*, 119 Mass., 240.

Held, that the clause making the insurance payable to the plaintiffs was merely a contingent order; that any violation of the conditions and stipulations of the policy which would defeat the right of the assured to recover upon it, would defeat the right of the plaintiffs.

Bates vs. Equitable Ins. Co., 10 Wall., 33; *Grosvenor vs. Atlantic Ins. Co.*, 17 N. Y., 391; *State Mut. F. I. Co. vs. Roberts*, 31 Pa. St., 438; *Footte vs. Hartford Ins. Co.*, 119 Mass., 259; *Smith vs. Union Ins. Co.*, 120 Mass., 90; *City Five Cents Saving Bank vs. Penn. Ins. Co.*, 122 Mass., 165.

Held, that the foreclosure of the mortgage effected a change of title of the assured by legal process within the meaning of the policy, and the policy thereby became void.

Campbell vs. Hamilton Mut. Ins. Co., 51 Maine, 69; *Abbott vs. Hampden Mut. F. Ins. Co.*, 30 Maine, 414.

Brunswick Savings Inst. vs. Commercial Union Ins. Co., *Me. S. C.*, 68 *Me.*, 313; 8 *Ins. Law Jour.*, 120.

PARTIES TO THE ACTION AND RIGHTS OF PARTIES.

14. The policy insured W. against loss, payable to C. C. was mortgagee and obtained the policy on which he paid the premiums. *Held*, that C. and not W. was the original contracting party and the proper party to sue, according to the law of N. H., and as the insurance exceeded the incumbrance, he could bring the action in his own name, as the agent of W., for the surplus.

Chamberlain vs. N. H. F. Ins. Co., *N. H. S. C.*, 4 *Ins. Law Jour.*, 649.

15. Under a policy "loss payable to mortgagee," the insured may sue in his own name, with or without the consent of the mortgagee, so long as he has an insurable interest. The legal effect of the clause is that of direction as to mode of payment which the insured is bound to regard, and which, when made, is performance by the insurer, not that of assignment. In an action by the insured, the insurer may plead performance when he has paid the mortgagee, and may protect himself against the mortgagee by payment into court.

The right of action under a life policy in *Hillyard vs. Mutual Benefit Life Ins. Co.*, 6 Vroom, 413; 8 Vroom, 444; *Bliss on Life Ins.*, § 317; *Trenton Mu-*

tual Life Ins. Co. vs. Johnson, 4 Zab., 576; Dalby vs. India, etc., Co., 15 C. B., 365, distinguished.

Sandford vs. Mechanics' Insurance Company, 12 Cush., 541; Grosvenor vs. Atlantic Insurance Company, 17 New York, 391; Bidwell vs. N. W. Insurance Company, 19 New York, 179; Sussex Co. Mutual Insurance Co. vs. Woodruff, 2 Dutcher, 542; Fogg vs. Middlesex Ins. Co., 10 Cush., 346; Hale vs. Mech. Ins. Co., 6 Gray, 172; Loring vs. Manuf. Ins. Co., 8 Gray, 29; Turner vs. Quincy Ins. Co., 109 Mass., 573; Farrow vs. Commonwealth Ins. Co., 18 Pick., 53; Jackson vs. Farmers' Ins. Co., 5 Gray, 52; Turner vs. Quincy Ins. Co., 109 Mass., 568; Davis vs. Boardman, 12 Mass., 80; Ward vs. Wood, 13 Mass., 539; Rider vs. Ocean Ins. Co., 20 Pick., 259; Ketcham vs. Protection Ins. Co., 1 Allen R., 136; Nevins vs. Rockingham Ins. Co., 5 Foster (N. H.), 22; Tolson vs. Belknap Co. Ins. Co., 10 ib., 231.

Martin vs. Franklin Ins. Co., N. J. S. C., 5 Ins. Law Jour., 144.

16. The loss was payable to mortgagees as their interest may appear. It appeared that the mortgagees had but a partial, and not a controlling interest in the loss. *Held*, that there could not be a splitting up of the causes of action on a single policy. The control of the policy, and consequently the right of action, belonged to the original insured, not to the mortgagees.

Van Buren vs. St. Josephs Co. Mut. Ins. Co., 23 Mich. R., 404; Clay F. & M. Ins. Co. vs. Huron Salt & L. Co., 31 Mich., 346.

Hartford F. Ins. Co. vs. Davenport, Mich. S. C., 37 Mich., 609; 7 Ins. Law Jour., 228.

17. If a policy of insurance is payable to a mortgagee of the premises as his interest shall appear, and if, when a loss becomes payable his mortgage debt is in fact greater than the sum insured, the legal title of the policy is in him, and he may sue upon it alone, holding any surplus as trustee for mortgagor.

Appleton Ins. Co. vs. Ins. Co., 46 Wis., 24; Northwestern M. L. Ins. Co. vs. Germania F. Ins. Co., 40 Wis., 446; Grosvenor vs. Ins. Co., 17 N. Y., 391; Cone vs. Ins. Co., 60 N. Y., 619; Ennis vs. Ins. Co., 3 Bosworth, 516; Chamberlain vs. Ins. Co., 55 N. H., 249; May on Insurance, § 449; Cone vs. Ins. Co., *supra*.

In an action upon such a policy by the mortgagee alone, the question whether the mortgagor is a necessary plaintiff, cannot be raised by demurrer, unless the complaint itself shows an interest in the mortgagor; and an averment that the mortgage debt still

due the plaintiff, exceeds the insurance, being admitted by demurrer, shows that plaintiff is the sole party in interest.

Dupont vs. Davis, 36 Wis., 631.

Hammel vs. Queen Ins. Co., Wis. S. C., 9 Ins. Law Jour., 905.

18. S. mortgaged the property to A., one condition being that if the mortgagor should keep the building insured for the benefit of the mortgagee at such offices as he shall approve until the payment of the debt, and perform the other conditions named, it should be void. Insurance was obtained by S. more than a year after the mortgage without the knowledge or consent of A., in his own name, on the house, and the furniture which was not mortgaged, in one policy. The policy was kept by S., and no assignment or agreement with A. was made other than that in the mortgage. *Held*, that the facts do not justify the inference that the policy was obtained with the intention to perform the condition of the mortgage so as to bring it within those cases which hold that under such circumstances the mortgagee has an equitable lien on the fund. *Held*, that the policy covering part of the property of S. not subject to the mortgage, A. could not in any event enforce his claim by a suit at law in the name of S., since it would require the company to pay one loss by installments to two parties, and be subject to two suits in the same cause of action.

Cases of Providence Co. Bank vs. Boston, 24 Pick., 204; *Hazard vs. Draper* 7 Allen, 266; *Nichols vs. Baxter*, 5 R. I., 34; *Commonwealth vs. Brooklyn Ins. Co.*, 44 N. Y., 42 distinguished. *Moodly vs. Wright*, 13 Met., 17, 32; *Palmer vs. Morrill*, 6 Cush., 222; *Christmas vs. Russell*, 14 Wall., 70; *Morington vs. Keane*, 2 De G. & J. 292, 317, *Gibson vs. Cook*, 20 Pick., 15.

Stearns vs. Quincy Mut. Fire Ins. Co., Mass. S. J. C., 124 Mass., 161; 7 Ins. Law Jour., 506.

19. The insurance runs to W. as the owner of the property, but any loss is declared payable to plaintiff and one H., "as their interests shall appear," each of them holding a mortgage on the premises. When the action was brought, the amount due on W.'s mortgage to plaintiff exceeded the amount of the policy, and W. and H. had assigned their interests to plaintiff. *Held*, that plaintiff is entitled to recover the whole loss, notwithstand-

ing payments made to it by W. *pendente lite*, reducing his mortgage indebtedness to a smaller sum.

N. W. Mut. Life Ins. Co. vs. Germania Fire Ins. Co., Wis. S. C., 40 Wis., 446.

20. After judgment for the foreclosure of a mortgage of insured premises, the mortgagor retains an insurable interest until the time for redemption expires. Where A. takes out a fire policy by whose terms a loss under it is payable to B., the latter has a right to pay the renewal premium for A. on the failure of A. to make such payment. And it seems that payment by any person, accepted by the insurer, operates to renew the policy.

Mechler vs. Phoenix Ins. Co., Wis. S. C., 38 Wis., 665.

21. On a policy against loss by fire, issued to the owner of the premises with an entry on the face of the policy, "Loss, if any, payable to M., as his interest may appear," signed and approved by the agent of the insurance company, an action may be maintained by the person to whom the loss is made payable, as on a contract with him to pay him according to the terms of such appointment. The person with whom the insurer so contracts, holds subject to the conditions of the policy, and under a liability to have his rights defeated by a breach of the conditions of insurance by the insured, but nevertheless he takes under a contract with the insurer of its own making. If suits be pending both by the insured and by the person to whom the loss is made payable, the courts in virtue of their equitable control over actions, can so control the litigation that it may not be made vexatious.

State Ins. Co. vs. Maackins, N. J. C. E., 38 N. J., 564.

22. In an action on a fire insurance policy containing a clause inserted therein after its execution, making the loss under it, if any, payable to G. W. B., mortgagee, and other clauses providing that if the property insured should be sold or conveyed, without the consent of the company in writing, the policy should be void, and that a judgment in foreclosure proceedings should be deemed an alienation of the property, one of the defenses being that the plaintiff willfully set fire to the property in question. The court charged the jury: That the plaintiff might recover the full amount of

the insurance money mentioned in the policy, notwithstanding the clause making a part of the loss payable to the mortgagee, if the jury believed that the value of the premises equaled or exceeded the amount insured; That in order to make out the defense of burning by design, the defendant was bound to establish it beyond a reasonable doubt, and by the same measure of proof that would be required to convict the plaintiff if tried on an indictment charging that offense; That a decree in an ordinary foreclosure suit, without further proceedings, would not preclude the plaintiff from maintaining his action. *Held*, that the charge was right.

Kane vs. Hibernia Mut. Fire Ins. Co., N. J. C. E., 38 N. J., 441.

23. Where a mortgagor has procured an insurance for his own benefit—loss payable to the mortgagee; the mortgagee may, by an independent contract with the insurer, protect his interest against the acts of the mortgagor upon such terms and conditions as he may secure from the insurer, provided they do not impair or affect the rights of the mortgagor. Plaintiff held a mortgage upon certain real estate, containing a clause requiring the mortgagor to procure an insurance for the benefit of the mortgagee. The owner of the real estate procured an insurance, “loss payable to the mortgagee.” Plaintiff had an independent contract with the insurance company, by the terms of which all policies of the company assigned to or held by plaintiff as mortgagee should be binding and its interest absolutely insured, and providing for subrogation in case the policy should be void as to the mortgagor. By breach of a condition in the policy, it became forfeited as to the owner. A loss having occurred, the company paid the loss to plaintiff, taking an assignment of so much of the mortgage subject to the payment of the balance due plaintiff. In a contest as to surplus moneys arising on sale, under a judgment in an action brought to foreclose the mortgage, *Held*, that the agreement between plaintiff and the insurer, and the assignment thereunder, was valid, and the latter was entitled to the surplus; that the owner, having forfeited her rights under the policy, was not entitled to the benefit of the payment, and was not injured by

the assignment; that it could not be inferred that the insurer waived the forfeiture and so paid the insurance, as from the fact that it exacted and procured the assignment to which it was entitled under its contract with plaintiff, the conclusion was irresistible that it simply paid in compliance with the obligations of that contract.

Ulster Svcs. Inst. vs. Leake, N. Y. C. A., 73 N. Y., 161.

24. G., the mortgagor, agreed to keep the premises insured and assign the policy to plaintiff, mortgagee, or in default plaintiff might insure at the expense of G. The premises were subsequently conveyed by G. to her ward, J., whereupon plaintiff of his own motion procured insurance in the name of J., as owner, loss payable to himself as mortgagee. There was no allegation that G. had failed to comply with the stipulation regarding insurance. The policy stipulated that proofs should be furnished by the insured. *Held*, that neither G. nor J. had any part in making the contract. J. was under no obligation to pay the mortgage, and neither could be legally compelled to aid plaintiff in furnishing proofs, and if plaintiff cannot do so of himself, he cannot therefore, compel parties to do so who are under no legal obligation. *Held*, that an action for equitable relief cannot be maintained against G. or J. or the company on such ground. The action cannot be maintained, and is not needed to destroy its defense based on the limitation clause, nor to recover on the policy. The suit must be determined in an action at law.

Graham vs. Phœnix Ins. Co. et al., N. Y. C. A., 77 N. Y., 171; 8 Ins. Law Jour., 657.

25. In a federal court on a policy issued to mortgagor, loss payable to mortgagee, suit must be in name of the latter, the party in interest. But the contract is with the mortgagor, and a violation by him forfeits the insurance. Where the property has been repaired and its capacity to make good the mortgage debt is unimpaired, there is no right of action.

Friemansdorf vs. Watertown F. Ins. Co., U. S. C. C., S. D. Ill.

26. By the terms of a mortgage the mortgagors were bound to

keep the property insured against fire to a certain amount and assign the policy to the mortgagee: and, in case of their failure to do so, the mortgagee was authorized to insure to that amount, and the premiums paid were to become part of the mortgage debt. On foreclosure of the mortgage, judgment for the amount of the mortgage debt, with the costs and disbursements, was entered against the parties personally liable, but no provision was inserted therein authorizing the sheriff to pay, out of the proceeds of the sale, any sums which the mortgagee might be compelled to pay thereafter to keep the property so insured. During the year allowed by the statute for redemption before sale, the mortgagee paid premiums to keep up the insurance, on the mortgagor's default in that respect. The land having then been sold for the exact amount specified in the judgment, the court on proof made, entered a further judgment or order for the amount so paid by the mortgagee for insurance, against the parties personally liable for the mortgage debt, and awarded execution therefor. *Held*, that there was no authority for such order or judgment.

N. W. Mut. Life Ins. Co. vs. Drown et al., Wis. S. C., 10 *Ins. Law Jour.*, 377.

27. A mortgagee of real estate has no lien upon a policy of insurance procured thereon by the mortgagor, which has been settled in good faith by the insurers before the expiration of sixty days after loss of the property by fire, and before any notice of the lien required by statute to be filed within the sixty days, but after such settlement.

Burns vs. Collins, Me. S. J. C., 64 Me., 215.

28. Mortgagors who have caused the mortgaged property to be insured in their own names by a policy making the amount insured payable to the mortgagee in case of loss, may, with the consent of the mortgagee, sustain an action in their own names upon the policy. Failure to notify the assured that the proofs of loss furnished by him to the company are insufficient, will be deemed a waiver of defects, and the objection cannot be made at the trial.

Patterson vs. Triumph Ins. Co., Me. S. J. C., 64 Me., 500.

GENERALLY.

29. A perpetual policy was transferred by the owner insured, to the mortgagee as collateral security. The insured afterwards sold the property and assigned the policies to the grantee. The mortgagee foreclosed, and the sale did not realize sufficient to satisfy the mortgage. *Held*, that the mortgagee was entitled to the return premiums. *Held*, that the policy remained after the assignment as before, an insurance of the mortgagor's estate, the mortgagee acquired not an interest in the insurance as such, but a right to appropriate the amount to the payment of the mortgage debt.

State Ins. Co. vs. Roberts, 7 Casey, 438; Carpenter vs. Wash. Ins. Co., 16 Pet., 495, 512; Grosvenor vs. Atlantic Ins. Co., 17 N. Y., 391; Macomber vs. Ins. Co., 8 Cush., 133; Hale vs. Ins. Co., 6 Gray, 169.

Held, that the transfer is made to him as creditor as well as mortgagee, and the effect is nearly the same as if he had no specific lien; hence such an assignment as collateral security will not be invalidated by the discharge of the mortgage lien while the bond remains unsatisfied.

Rafsnnyder's Appeal, Pa. S. C., 88 Pa., 436.

30. The policy was issued on the application of the mortgagee, in the name of the mortgagor, loss payable to mortgagee. The mortgage contained a clause requiring the mortgagor to insure for the benefit of the mortgagee, and in case of neglect authorizing the latter to insure and retain a lien for the premiums. The policy was void as to the mortgagor by reason of other insurance without consent. But payment of the loss was made in pursuance of a previous agreement by the company with the mortgagee, that its interest in all policies held by it as mortgagee, should be absolutely insured against any loss. The contract also provided that when "the policy may be deemed invalid as to the interest of the mortgagor," the bond and mortgage should be assigned to the company, "it being understood that the only object of the agreement is to protect the mortgagees from loss." *Held*, that where the insurance is effected by the mortgagee independent of the mortgagor, the company is entitled to subrogation, but where by any arrangement between the mortgagor and mortgagee, the in-

insurance is effected for the benefit of the former, or he pays the premium, and loss ensues, he is entitled to have the amount applied in payment of the mortgage.

55 N. Y., 343; 17 N. Y., 428.

Held, that the insurance being void as to the mortgagor, the payment was made on the independent contract made with the mortgagee, as evidenced by the company exacting an assignment of the mortgage. *Held*, that the provision regarding subrogation was part of the consideration for absolute insurance of the mortgagee. *Held*, that the agreement was not inimical to the interest of the mortgagor, and is to be distinguished from those cases in which the insurance remained valid as to the mortgagor. *Held*, that the company was entitled to the benefit of the subrogation.

Waring vs. Loder, 53 N. Y., 581; Springfield Ins. Co. vs. Allen, 43 N. Y., 389; Fraser vs. Hampden Fire Ins. Co., 10 Allen, 261; Thomas on Mortgages, 183. Case of 7 Cush., 1, excepted to.

Ulster Co. Savings Institution vs. Decker, N. Y. C. A., 7 Ins. Law Jour., 759.

31. R. effected a permanent insurance as owner, and transferred the policies to A., mortgagee, as collateral security. R. then conveyed the property, with an assignment of the policies, to M., subject to mortgages. A. subsequently assigned the mortgages to H., who issued writs of *scire facias* under which the property was sold by the sheriff for less than the debt. *Held*, that the policy remained after the transfer an insurance of the mortgagor's estate; the mortgagee simply acquired the right to appropriate the amount needed to satisfy the mortgage debt. Hence an assignment as collateral security for a bond and mortgage is not invalidated by the discharge of the mortgage lien so long as the bond remains unpaid. *Held*, that a mortgagee to whom a permanent insurance has been assigned as a security, is entitled to the deposit or premium, on a sale being made of the mortgaged premises, which puts an end to his insurable interest and to that of the mortgagor, so far as may be necessary to make a deficiency in the price realized.

Hollis vs. Springarden Ins. Co. et al., Philadelphia (Pa.) C. P., 8 Ins. Law Jour., 77.

WHEN THE POLICY IS IN THE NAME OF THE MORTGAGEE.

32. The insured mortgagee had agreed with C. to sell and assign certain mortgages for much less than their face value, upon completion of the payments for the same, for which C. had given notes, and that there should be no foreclosure proceedings until default had been made. The property was burned after one payment had been made. *Held*, that the payment did not diminish the amount due upon the mortgages, nor the insured's interest as mortgagee. Therefore the insurers are liable, as if no payment had been made.

Haley, Morse & Co. vs. Manfr's F. and M. Ins. Co., Mass. S. J. C., 120 Mass. 292; 5 Ins. Law Jour., 614.

33. Where, by the terms of a mortgage, the mortgagee, in case of failure on the part of the mortgagor to keep the buildings upon the mortgaged premises insured, is authorized to make such insurance, and it is declared that the premiums paid shall be deemed secured by the mortgage, the provision does not prohibit or prevent an insurance by the mortgagee directly of his interest, and he may make such terms with the insurer as they may agree upon. Where, therefore, the holder of such a mortgage takes out a policy of insurance upon his interest as mortgagee, with a provision in the policy that in case of loss the assured shall assign to the insurer an interest in the mortgage equal to the amount of loss paid, the insurer is entitled to the subrogation provided for; the contract of insurance is paramount to and independent of the contract between the mortgagor and mortgagee, and the rights of the insurer cannot be affected thereby. The consent of the mortgagor is not essential to the validity of such a provision for subrogation. *Held*, where such a policy had been issued by defendant, and where, a loss having occurred, it paid to the holder of the mortgage the amount thereof, together with the premiums paid, and took an assignment of the mortgage, that in an action to foreclose the mortgage, the mortgagor or his grantee could not claim an application of the amount of his insurance as payment upon the mortgage. *Held*, that knowledge on the part of the defendants at the time of issuing the policy, of the terms of the mortgage, did not affect its contract. *Held*, that the fact that the policy did not

provide expressly for the assignment of the bond secured by the mortgage, but only specified the latter, did not establish that the assignment of the former also could not have been compelled by the insurance company, and so that the payment to the mortgagee was in liquidation of the bond. The evident intent was to include both in the transfer. The fact that by the declarations of the mortgagee in such case the mortgagor was prevented from insuring in his own behalf, cannot affect the rights of the insurer; if the mortgagee was in a position where he could not lawfully enter into the contract with the insurer, the latter was not bound to pay the loss, and having so paid, by the assignment became the owner of the entire interest in the mortgage.

Excelsior Fire Ins. Co. vs. Royal Ins. Co., 55 N. Y., 359.

It was said in the opinion: "It is settled that when a mortgagee, or one in like position toward property, is insured therein at his own expense, upon his motion, and for his sole benefit, and a loss happens to it, the insurer in making compensation is entitled to an assignment of the rights of the insured."

See also *Cone vs. Chicago Fire Ins. Co.*, 60 N. Y., 624; *Ætna Fire Ins. Co. vs. Tyler*, 16 Wend., 385; *Flanders on F. Ins.*, 2d ed., 400; *Kernochan vs. New York Bowery Ins. Co.*, 17 N. Y., 428; *Springfield F. & M. Ins. Co. vs. Allen*, 43 N. Y., 394. Cases distinguished of *Waring vs. Loder*, 53 N. Y., 585; *Clinton vs. Hope Ins. Co.*, 45 N. Y., 467; *Kernochan vs. Bowery F. Ins. Co.*, *supra*; *Benjamin vs. Saratoga Mut. F. Ins. Co.*, 17 N. Y., 415; *Cromwell vs. Brooklyn F. Ins. Co.*, 44 N. Y., 47; *Flanders on Ins.*, 1871, 347, 361.

Foster vs. Van Reed et al., *N. Y. C. A.*, 70 *N. Y.*, 19; 8 *Ins. Law Jour.*, 201.

34. J. and G. were authorized by one Greene to effect insurance on his buildings and machinery as security for advances made, which they did under an open policy in their own names, charging the premiums to Green. Green was previously indebted to F., secured by mortgage stipulating that Greene should insure for the benefit of F., and transfer the policy, or in default, that the mortgagees might effect such insurance at his expense. *Held*, that in the absence of any understanding with J. and G., F. had no claim on the insurance effected by them. *Held*, that the allegation of a want of insurable interest in the buildings on the part of J. and G., could only be made by the company,

not by F. *Held*, that as the insurance was in excess of the debt to J. and G., the balance belongs to Greene, and F. has an equitable claim upon such balance.

Thomas's Ex'rs. vs. Van Kaff's Ex'rs., 6 Gill & Johns., 372; note to 3 Kent's Com., 376; Angell on Fire and Life Ins., § 62; Amer. Lead. Cas., 834, 5th ed.; 1 Herman on Mortgages, §424, and cases there cited; Nichols vs. Baxter et al., 5 R. Isl., 491; Civil Code La., art. 1,965; Williams vs. Winchester, 7 Martin, N. S., 22; Citizens' Bank vs. Dugue et al., 5 Am., 15; Braden vs. Lou. Ins. Co., 1 La., 220; Case of Caster vs. Rockett, 8 Paige, 437, distinguished.

Wheeler et al. vs. Factors & Traders' Ins. Co., U. S. S. C., 9 Ins. Law Jour., 876.

35. The policy insured E. on her interest as mortgagee. The property was after the fire repaired by the mortgagor, and the premises were at all times ample security for the mortgage. The policy was designed by the mortgagee to be for the benefit of the mortgagor and herself, the proceeds in case of loss to be applied to the mortgage debt. There was an alleged agreement to that effect, and previous insurances had been on the interest of the mortgagor payable to the mortgagee. The mortgagee did not discover that this policy was different until after the loss, but there was no mistake or fault on the part of the company which would allow of its reformation. Afterwards the mortgagee gave to mortgagor the policy, along with a written statement addressed to the company setting forth that the insurance was for his benefit, which, with a demand for the money, was served on the company. *Held*, that the mortgagor was the equitable assignee of the policy, and entitled to sue in his own name. *Held*, that a right of subrogation, even if it existed, was not precedent to nor concurrent with payment, but founded on such payment. *Held*, that the alleged agreement between the mortgagor and mortgagee was not an executory but an executed agreement, and cannot be objected to by the company on the ground that the mortgagee was a married woman and incapacitated. Coverture may be pleaded by the *femme covert*, but not by any of her co-parties. *Held*, that the fact that the property was sufficient security after the fire was no defense to a policy thus taken out by agreement between the mortgagor and mortgagee. *Held*, that the repairing of the property by the mortgagor was no defense.

Held, that the company was not entitled to be subrogated to the mortgagee's interest.

May on Ins., 115.

Ætna Ins. Co. vs. Baker, Ind. S. C., 10 *Ins. Law Jour.*, 253.

36. In computing the amount due under an equitable mortgage where the mortgagee collects an insurance on the property insured in his own name, he must account for the proceeds if he insures the property upon the authority and at the expense of the mortgagor, but not if he insures merely on his own account, nor if in the policy there is an agreement that the insurer shall be subrogated to the rights of the mortgagee.

Stinchfield vs. Milliken, Me. S. J. C., 71 *Me.*, 567.

See Cross Index for other cases bearing on MORTGAGOR AND MORTGAGEE.

MUTUAL COMPANIES.

ABSTRACT OF THE LAW.

a. The relations of members of mutual companies are in many though not all respects, analogous to those of stockholders in stock companies.

Mygatt vs. N. Y. Protection Ins. Co., 21 *N. Y.*, 52.

b. Contribution to the common fund may be regarded as the basis of the principle of mutuality, and the fact that the liability of the member has been wholly met, is not in conflict.

Mygatt vs. Ins. Co., *supra*.

c. Members of mutual companies are presumed to have knowledge of the charter and by-laws, and are usually bound by them.

Mitchell vs. Lycoming Ins. Co., 51 *Penn. St.*, 402.

d. But a member is not bound by the rules affecting his contract, when passed subsequently without his consent.

Great Falls vs. Ins. Co., 49 *N. H.*, 292; *Hamilton vs. Hobart*, 2 *Gray (Mass.)*, 543.

e. Members cannot take advantage of irregularities on the part of the company, nor set up a lack of insurable interest, as a defense against assessment.

New England Ins. Co. vs. Belknap, 12 *Cush. (Mass.)*, 140; *Citizens' Ins. Co. vs. Sortwell*, 9 *Allen*, 217; *Sands vs. Hill*, 42 *Barb. (N. Y.)*, 651.

f. Members are liable for assessments under the charter and by-laws, though their policies may be void through their own wrongful acts.

Iowa State Mutual Ins. Co. vs. Prosser, 11 *Iowa*, 115.

g. Assessments, however, made after such forfeiture, are a waiver of forfeiture if made for losses subsequently occurring, but not if the losses occurred prior to the forfeiture.

Ins. Co. vs. Stockbower, 26 Penn. St., 199; *Sands vs. Hill*, *supra*; *Velle vs. Ins. Co.*, 19 Barb., 440.

h. The obligations of membership do not attach until the contract has become completed.

Columbia Ins. Co. vs. Cooper, 50 Penn. St., 331.

See further on this subject under ASSESSMENT, CHARTER, PREMIUM NOTE.

DIGEST OF RECENT CASES.

1. One previously insured in the same mutual company is chargeable with notice of its by-laws and business conditions.

Angel, § 146; *Mitchell vs. Ins. Co.*, 51 Penn. St., 402; *Simeral vs. Ins. Co.*, 18 Iowa, 319; *Coles vs. Ins. Co.*, *ib.*, 425.

Fuller vs. Madison Mut. Ins. Co., *Wis. S. C.*, 36 *Wis.*, 599; 4 *Ins. Law Jour.*, 841.

2. In the case of a mutual fire insurance company, membership dates only from the consummation of the contract. During negotiations for insurance, a mutual company occupies no other or better position than one organized on the stock plan.

Lycoming F. Ins. Co. vs. Woodworth, 2 *Norris*, 223.

Eilenberger vs. Prot. Mut. F. Ins. Co., *Pa. S. C.*, 89 *Pa.*, 464; 8 *Ins. Law Jour.*, 822.

3. A provision in the charter of a mutual insurance company, that if a certificate of a right to receive a share of profits should not be presented within five years after notice of readiness to redeem should be given, it should be canceled on the books of the company, and the amount carried to the credit of the company, is not a forfeiture against which equity will relieve, but a mere limitation. In such case formal cancellation is not necessary to bar a recovery on the certificate; the bar becomes complete by mere lapse of time.

Lang vs. Delaware Safety Ins. Co., *Pa. S. C.*, 10 *Ins. Law Jour.*, 226.

4. A policy issued by a mutual fire insurance company, insured

the holder against loss or damage by fire under the conditions and limitations expressed in the rules of the company, and stated the undertaking of the company to be, "to satisfy and make good from the absolute and conditional funds of the company, unto the said assured, all the damage by fire which may happen to real estate, within the term aforesaid, according to the true intent and meaning of said rules. Provided, nevertheless, that if the absolute and conditional funds of said company shall be insufficient to pay and satisfy all damages that may happen, in such case a just average shall be made to the sufferers, and the payment to be demanded in virtue of this policy shall be a dividend of said stock, in proportion to the sum insured and the rate of damage." One rule required notice of a loss to be given in a prescribed manner, and provided that "payment shall be in thirty days after receiving notice of the loss as above." Another rule provided that "in case losses should happen so as to absorb the whole of the absolute fund, the president and directors shall, within twenty days, proceed to assess on each member a sum not exceeding double the amount by him paid by way of premium and deposit, and the same assessment publish in two or more newspapers in Boston. They shall then correct the said assessment without delay, and in thirty days after such notice shall be given, they shall actually proceed in due form of law against each delinquent, and thereby be completely exonerated. In case of neglect, they may be subjected to the penalty expressed in the act of incorporation. In case of neglect to pay said assessment, such delinquents' policy or policies shall cease and determine until payment is made with interest, and such reasons given for the delay as shall be satisfactory to the president and directors." *Held*, that after losses which absorbed the absolute funds of the company and required an assessment upon the contingent liability of the members, the insured who had sustained losses were not entitled to interest thereon out of the surplus remaining from the assessments after the payment of the losses. A mutual fire insurance company is not liable for any loss which occurs after the appointment of receivers and the judicial sequestration of all its property; and where, upon the happening of losses which absorb the absolute

fund of the company and require an assessment upon the contingent liability of the members, the fund accruing from the assessment is more than enough to pay for the losses, the receivers are not entitled to retain any part of the surplus for the purpose of meeting future losses. Where the losses upon policies issued by a mutual fire insurance company are so large as to exhaust the absolute fund of the company, and an assessment is made in accordance with the rules of the company, upon the contingent liability of the members, which proves to be more than sufficient to pay the amount required, the surplus is, in the absence of any requirement in the rules of the company that it shall be devoted to other uses, to be repaid to the members by whom the assessment was made.

Commonwealth vs. Mass. Ins. Co., Mass. S. J. C., 119 Mass., 45.

5. Where a guardian insures a building, the property of his ward, in a mutual fire insurance company, by a policy not under seal, in his own name as guardian, and afterwards upon the alienation of the property by the ward after coming of age, gives verbal authority to another to transfer the policy to the alienee, which is done in his absence, and the policy is accepted by the alienee, and the transfer assented to by the company and recorded, the alienee becomes a member of the company, and is liable to assessments until he ceases to be a member in accordance with its provisions. Where, upon the sale of real estate, the purchaser gives back to the seller a mortgage upon the property, and assigns to him as security therefor a policy of fire insurance in a mutual company, which he holds upon the property, and the transfer is recorded in the books of the company, the mortgagor is the party liable to assessment by the company.

Cummings vs. Hildreth, Mass. S. J. C., 117 Mass., 309.

6. The by-law of a mutual fire insurance company provided that "when any building insured by this company shall be alienated unconditionally, either by the act of the assured or by operation of law, except in the case of descent to heirs, the policy may be surrendered to the company or be transferred to the alienee of the building, who, with the consent of the president, may be entitled to all the rights of the original holder of the policy, by giving

his engagement in writing, to assume all the liabilities imposed by the same, and such policy, if not surrendered or transferred as aforesaid, shall become void." A member of the company alienated unconditionally a building insured, but did not surrender his policy to the company, or transfer to the alienee of the building. *Held*, that he was still a member of the company, and liable to an assessment subsequently laid.

Cummings vs. Sawyer, Mass. S. J. C., 117 Mass., 30.

7. A contract of insurance with a mutual insurance company is not binding until the liability of the insured to contribute to losses is fixed. The by-laws of a mutual insurance company required that the policy should be signed by the insured, and that certain premiums and fees should be prepaid. The agent of the plaintiff went to the office of the company to effect an insurance of certain property of plaintiff, and stated that he would pay these premiums and fees when he received the policy. A policy was duly executed on the same day, except the signature of plaintiff, and the latter was enrolled as a member on the books of the company. On the day following, the property was destroyed by fire. The agent of plaintiff, the next day tendered the premiums and demanded the policy, which the company refused. In an action against the company for the amount named in the policy; *Held*, that the contract of insurance was not completed, and the court properly directed a nonsuit.

Schaffer vs. Ins. Co., Pa. S. C., 89 Penn., 296.

8. Where the charter of a mutual fire insurance company provides that it shall have a lien in the nature of a judgment upon the property of the insured for his premium note, and by the terms of the charter it is manifest the lien is to be restricted to real estate, the fact that a part of the risk covered by the policy is on personal estate, will not prevent the filing of a lien against the real estate. Nor is such a lien invalid by reason of having been filed after the expiration of the policy.

People's Fire Insurance Co. vs. Hartshorne, Pa. S. C., 84 Penn., 453.

See Cross Index for other cases bearing on **MUTUAL COMPANIES.**

NAVIGATION.

DIGEST OF RECENT CASES.

1. In the case of a vessel wrecked against a bridge in the Mississippi, *Held*, that railroad bridges, though to a certain extent impediments to commerce, are themselves highways of commerce, and officers of steamers plying on Western rivers must be held to the full measure of responsibility in navigating streams crossed by bridges.

Steamboat Mollie Mohler vs. Home Ins. Co., U. S. S. C., 4 Ins. Law Jour., 799.

See Cross Index for other cases bearing on NAVIGATION.

NEGLIGENCE.

ABSTRACT OF THE LAW.

a. The contract is not avoided by a loss due to the perils insured against, but chargeable to negligence on the part of the insured or his representatives; this holds good both in case of fire and marine policies.

Jackson vs. Berkshire Mutual Ins. Co., 4 Allen (Mass.), 388; Columbian Ins. Co. vs. Lawrence, 10 Pet. (U. S.), 507; Huckins vs. People's Ins. Co., 11 Fost. (N. H.), 238.

b. But gross misconduct amounting to actual or constructive fraud, will work a forfeiture.

Chandler vs. Worcester Mutual Ins. Co., 3 Cush. (Mass.), 328.

c. Negligence of a master in failing to repair a vessel rendered unseaworthy, upon reaching a port where such repairs can be made, will exempt the insurers.

Hazzard vs. New England Marine Ins. Co., 1 Sumner, 218; Stewart vs. Ins. Co., 1 Humph., 242.

See further on this subject under BARRATRY, CARRIER, COLLISION, PERILS OF THE SEA.

DIGEST OF RECENT CASES.

1. A contract of marine insurance upon a steam-tug provided that the insurer should not be liable for losses arising from "the following or other legally excluded causes, viz.: . . . incompetency of the master or insufficiency of the crew, and want of ordinary care or skill in navigating said vessel." It appeared that the master while navigating Lake Michigan, the fuel being exhausted, let go the anchor in a storm, and with his crew, abandoned the tug and went ashore; and that a few hours afterwards, the cable parted and the tug was wrecked. In this action upon the policy, the jury found specially that the master did not do "all that a skillful, careful, and prudent seaman could do to prevent the wrecking of the boat," and that it was his duty "to remain on board of the tug, or leave a man there to attend the cable;" but, to the question, "Did the master leave said boat only when, in his opinion, to stay longer would endanger the life of himself and the crew?" they also answered "Yes." On appeal from a judgment in plaintiff's favor; *Held*, that the findings are so inconsistent as to require a new trial.

Haas Adm'r vs. C. & N. W. R., 41 Wis., 64; Kearney Adm'r vs. C. M. & S. P. R., 47 Wis., 144.

To render a ship "seaworthy," within the meaning of a contract of insurance, she must be sufficiently furnished with proper cables and anchors.

1 Kay's Law of Shipmasters, 90; Wilkie vs. Geddes, 3 Daw., 57; Merch. Mut. Ins. Co. vs. Sweet, 6 Wis., 670, and cases cited.

Lawton vs. Royal Canadian Ins. Co., Wis. S. C., 10 Ins. Law Jour., 17.

2. The libel in this case was brought to recover damages for injuries to goods shipped. The shipments, and injuries to the goods, were admitted. The defense relied on was injury by "peril of the seas." The master, in a dense fog, attempted to come up the harbor of San Francisco, when he could have safely anchored, and the vessel ran ashore. The captain was one of the most skillful commanders of the port. *Held*, that where the safety of the vessel and the lives of all on board depended on the

prompt and exact obedience by the helmsman of every order given by the master, it was negligence to have neglected any means of preventing the possibility of a mistake. The master had no right to expose his vessel to unnecessary and great perils.

Hackfield & Co. vs. Steamship Costa Rica, U. S. D. C. Cal., 5 Ins. Law Jour., 396.

3. The action below was to recover \$2,500 upon a policy of insurance issued by the plaintiffs upon the steamboat Calumet in September, 1870, against loss by fire, storms, or other perils of the river. In July, 1871, the boat sank in the Mississippi, about half a mile above Vicksburg, where she had been laid up for a period of nearly nine months. It was claimed by the plaintiff in error that the testimony failed to show that the vessel was lost by encountering any of the perils insured against; that, on the contrary, the weight of the evidence was that she sunk because of her unseaworthiness, produced by her being laid up, which caused her seams to open and admit sufficient water to sink her; that the evidence failed to establish the theory of the defendants that the vessel was sunk from the effects of a storm which sprang up before daylight on the morning of the sinking, but that the evidence of the defendant disproved the theory by showing that there was no storm at that time and place. *Held*, that "if the boat was in such seaworthy condition, and sufficiently manned for such a boat so lying up, and her loss was occasioned by the mere negligence and want of proper care of her watchman and those having the care of her, the plaintiff will be entitled to recover, if he has proved all other necessary facts, for such negligence is a peril insured against."

Enterprise Ins. Co. vs. Parisot, Cin. (O.) Superior Court, 5 Ins. Law Jour., 70.

See Cross Index for other cases bearing on NEGLIGENCE.

NOTICE.

ABSTRACT OF THE LAW.

a. No particular form of notice is required, and it need not be in writing unless so stipulated; it is sufficient that it bring a knowledge of the fact or loss clearly before the insurer or his authorized representative.

Riggs vs. Mutual Ins. Co., 20 N. H., 198; *Killips vs. Putnam F. Ins. Co.*, 28 Wis., 472.

b. Where the particular party to whom notice must be given is designated in the contract, the requirement must be conformed to; where the particular method is designated, that also must be conformed to; in the absence of such requirement, notice to a local agent is usually sufficient, and the notice may be made by any party authorized by the insured.

Marsdon vs. Ass. Co., 1 Law Rep. (C. P.), 232; *Stimpson vs. Monmouth Mutual Ins. Co.*, 47 Me., 349; *Patrick vs. Farmers' Ins. Co.*, 43 N. H., 621; *Wyman vs. People's Eq. Ins. Co.*, 1 Allen (Mass.), 301.

c. Immediate notice is sufficiently complied with if furnished with due diligence under all the circumstances of the case.

Phillips vs. Protection Ins. Co., 14 Mo., 230; *Peoria Ins. Co. vs. Lewis*, 18 Ill., 533; *New York Central Ins. Co. vs. National Protection Ins. Co.*, 20 Barb., 468.

d. Any act on the part of the insurers which justifies the insured in the failure to give notice, or which would imply a recognition of their liability, will be deemed a waiver of notice, such as personal knowledge of the officers or representatives of the insurer, or a partial payment, or a refusal to pay upon other grounds, without objection to the sufficiency of the notice.

Clark vs. N. E. Ins. Co., 6 Cush. (Mass.), 342; *Lycoming Ins. Co. vs. Schreffler*, 42 Penn. St., 188; *Ætna Ins. Co. vs. Tyler*, 16 Wend. (N. Y.), 385; *Drake vs. Farmers' Union Ins. Co.*, 3 Grant's Cas., 325.

See further on this subject under AGENT, PROOFS OF LOSS, WAIVER.

DIGEST OF RECENT CASES.

NOTICE—WHAT IS SUFFICIENT COMPLIANCE OR WAIVER.

1. The policy required immediate notice of the vacation of the premises. The tenant moved out without the knowledge of the insured mortgagee. The notice was given as soon as the occasion was found to exist, which was several months later. *Held*, that

immediate notice means reasonable notice, and the notice was reasonable under the circumstances.

Chamberlain vs. N. H. Ins. Co., N. H. S. C., 55 N. H., 249 ; 4 Ins. Law Jour., 649.

2. "Due diligence" in countermanding an order for marine insurance or disclosing any subsequent discovery of facts enhancing the risk, does not in all cases require the use of the most expeditious means of communication possible. The requirement is satisfied by the use of the earliest and most expeditious usual route of mercantile communication to be judged of under the circumstances of the case. The question whether the particular mode is the usual one is a question of fact for the jury.

Grier vs. Young, rep. in Miller on Ins. ; Watson vs. Delafield, 2 Caines, 234 ; S. C., 1 Johns., 150 ; 2 Johns., 526 ; McLanahan vs. Universal Ins. Co., 1 Peters, 170 ; Green vs. Merchants' Ins. Co., 10 Pick., 402 ; Byrnes vs. Alexander, 1 Brevard, S. C., 213.

Andrews vs. Marine Ins. Co., 9 J. R., 34 ; 2 Duer on Ins., note 4, p. 530 and p. 410, distinguished.

The Atlantic telegraph was not a usual mode of mercantile communication previous to November, 1866. Where an order for insurance to be effected in New York, was mailed from Liverpool on Oct. 27th, 1866, and information of the loss of the vessel was received by the applicant three days afterward, due diligence did not require that the intelligence should be transmitted by telegraph ; it was sufficient to expeditiously forward the information by mail.

Proudfoot vs. Montefiore, L. R., 2 Q. B., 513, distinguished.

Snow et al. vs. Mercantile Mut. Ins. Co., N. Y. Com. A., 4 Ins. Law Jour., 435.

3. A letter intended as a notice of loss, was sent, giving the detailed facts of the loss, and the company proceeded to take action upon it as a notice. *Held*, that this was a waiver of the formal objection that it was addressed to the president personally, and not in his official capacity, and was only signed by a member of the plaintiff firm in his individual name.

Flanders on Ins., 518-520 ; May on Ins., 567, and cases cited.

Where the company upon being informed of the loss proceeded to take official action in regard to its payment, and the officers in the course of several interviews refused payment on other grounds, and until their liability had been tested by a suit, and the company finally refused payment because the insured had forfeited their rights of membership under the constitution by having taken the benefit of the homestead law, and nothing was said about the absence of preliminary proofs until a month after suit had been instituted; *Held*, that this was a waiver of the requirement concerning such proofs.

Flanders on Fire Ins., pp. 541, 542; May on Ins., pp. 573, 574; Tayloe vs. Merch. Fire Ins. Co., 9 How., R. S. R., 390; Blake vs. Exchange Mut. Ins. Co., 12 Gray's R., 265; Columbian Ins. Co. vs. Lawrence, 2 Pet., R., 25, as explained in 9 How., U. S. R., 390, 404; 10 Pet., 507; O'Neil vs. Buffalo Fire Ins. Co., 3 Comst. R., 122; Home Ins. Co. vs. Cohen, 20 Gratt., 312; Angell on Fire and Life Ins., sec. 226, 227.

West Rockingham Mut. Fire Ins. Co. vs. Sheets & Co., Va. S. C. A., 5 Ins. Law Jour., 910.

4. Acceptance of a notice of loss defective in form, without objection by the company, is a waiver of sufficient notice. But the company is not concluded by a notice not served in time, because no objection is interposed when such service is made.

Knickerbocker Ins. Co. vs. Gould, Ill. S. C., 5 Ins. Law Jour., 789.

5. Where notice was required forthwith, and notice was given 23 days after the loss, it is for the jury to decide whether due diligence was observed.

Lycoming Mutual Fire Ins. Co. vs. Bedford, Pa. S. C., 5 Ins. Law Jour., 529.

6. The policy provided that the assured should forthwith give notice of loss through the general agent. Notice was given to the local agent two days after the fire, by whom it was forwarded to the company and acted upon within a few days. *Held*, that the local agent may be regarded as acting for the insured, and there was substantial compliance with the requirement that notice should be given to the general agent. *Held*, that "forthwith"

required that notice should be given within a reasonable time under all the circumstances, and this requirement was complied

Manett vs. Lycoming Ins. Co., N. Y. C. A., 6 Ins. L. J., 189.

Trink et al. vs. Hanover Fire Ins. Co., N. Y. C. A., 70 N. 593; 6 Ins. Law Jour., 707.

It is sufficient compliance with the condition of a policy requiring notice of a loss to be given "forthwith," or "immediately," that the party has used due diligence under all the circumstances.

New York Ins. Co. vs. National Ins. Co., 20 Barb., 475; *Bumstead vs. Mend Ins. Co.*, 12 New York, 81; *Columbian Ins. Co. vs. Lawrence*, 2 N. Y., 50.

The clause in a policy as to preliminary proofs, notice, etc., should always be construed with great liberality; and only requires such reasonable information as shall enable a company to make some estimate of its rights and duties before settlement.

McLaughlin vs. Washington Ins. Co., 23 Wend., 525; *Lawrence vs. Ocean Ins. Co.*, 11 John., 240; *Smith's Mercantile Law*, 516, note 10.

Continental Ins. Co. vs. Lippold, Neb. S. C., 3 Neb., 391; 4 Ins. Law Jour., 430.

The policy required that in case of loss notice must be given to the secretary forthwith, and within thirty days a particular statement must be delivered to the secretary. The policy was produced through the local agent, and was subsequently returned to him and forwarded to the company for its consent to certain alterations. The company retained the policy and canceled it. The insured had received no information of the cancellation at the time of the fire. The insured notified the local agent at once, the general agent, through whom the local agent had produced the policy of the company, also heard of it, and had an interview with the insured. The insured not having the policy, learned that notice was required to be given to the secretary thirty days subsequently, and gave it at once. *Held*, that "forthwith" does not mean immediately, but within a reasonable time, with reasonable diligence after the fire.

N. Y. Central Ins. Co. vs. Nat. Prot. Ins. Co., 20 Barb., 468; *Inman vs. Western Fire Ins. Co.*, 12 Wend., 452.

What is a reasonable time depends on all the circumstances. Under the circumstances in this case the notice was served within a reasonable time, and the facts being undisputed, it should have been so decided as a question of law.

Roth vs. Buffalo State Line R. R. Co., 34 N. Y., 548; *Hedges vs. Hudson R. R. Co.*, 49 N. Y., 223; *Willbeck vs. Holland*, 45 N. Y., 13.

When the insured gave the notice, the secretary, under the impression that the policy had been properly canceled, claimed that the company had no risk, and said nothing about the notice being too late. *Held*, that this was not a waiver of notice.

Bennett vs. Lycoming Mut. Ins. Co., N. Y. C. A., 67 N. Y., 274; 6 *Ins. Law Jour.*, 189.

9. The contract was by parol, and no policy had yet been issued through neglect of the agent. No notice of the loss, although known, was given by the agent, but the insured on learning of the loss took immediate steps, and notified the company four days later. *Held*, that this was sufficient compliance with a requirement of immediate notice, and the failure of the agent to issue the policy containing the requirement, estopped the company from objecting.

Wooddy vs. Old Dominion Ins. Co., Va. S. C. A., 9 *Ins. Law Jour.*, 276.

10. Where no particular officer was specified to whom notice of loss must be given, notice to the local agents was notice to the company.

Killips vs. Putnam Fire Ins. Co., Wis., 480.

Hartford F. Ins. Co. vs. Smith & Doll, Col. S. C., 7 *Ins. Law Jour.*, 140.

11. The policy provided that persons having a claim under this policy, shall give notice within five days, etc. *Held*, that where no penalty attached, delay in giving notice only postponed time of payment. *Held*, that it was sufficient for the insured to give notice though policy was payable to another.

Stagg vs. Aurora F. & M. Ins. Co., U. S. C. C., E. D. Mo.

12. Where a policy of insurance required immediate notice to

e given by the assured in case of a loss, and in the great fire of Chicago, on October 9, 1871, the plaintiff's property insured was burned; notice of the loss given Nov. 13, 1871, was held to have been given in sufficient time, in view of the great derangement in all kinds of business caused by the fire. Evidence offered by the defendant of the listing of the plaintiff's property for taxation, and the amendment thereof is properly rejected, the issue being the amount of the plaintiff's damage.

Knickerbocker Ins. Co. vs. McGinnes, Ill. S. C., 87 Ill., 76.

WHAT IS NOT SUFFICIENT COMPLIANCE OR WAIVER.

13. Where the policy required immediate notice if the premises were vacated, and the building burned down three months after the tenant had vacated, no notice having been given either to the insured or the company until after the fire; *Held*, that the condition had not been complied with.

Sleeper vs. New Hampshire Fire Ins. Co., N. H. S. C., 80 N. H., 239; 5 Ins. Law Jour., 537.

14. The policy and by-laws required a written notice in case of mortgage to be given to the secretary by the insured. *Held*, that the requirement could only be satisfied by the actual reception by the secretary of the information. Proof of the sending of such notice by mail was presumptive evidence for the jury, that it had been duly received.

1 Green. Ev., sec. 40; 1 Taylor Ev., sec. 147; *Com. vs. Jeffries*, 7 Allen, 13.

But this evidence might be rebutted by evidence that it was never in fact received. The obligation is not discharged by the deposit of a letter which fails to reach its destination.

Freeman vs. Morey, 45 Me., 50; *Greenfield B. vs. Crafts et al.*, 4 Allen, 457.

Plath vs. Minn. F. Mutual F. Assoc'n, Minn. S. C., 23 Minn., 477; 6 Ins. Law Jour., 595.

15. Notice by the insured, to the agent of a mutual company, of his desire to be no longer insured, does not destroy the relation. Such notice is not notice to the company. Evidence of

such notice was properly rejected. The insured is entitled to notice of assessments upon his premium note before suit for the same. The fact as to such notice is a question for the jury.

Thornton et al. vs. Western Reserve Farmers' Ins. Co., 7 Casey, 592, distinguished.

Buckley et al. vs. Columbia Ins. Co., Pa. S. C., 83 Pa., 298; 6 *Ins. Law Jour.*, 636.

16. When a policy of insurance stipulates that in the event of the destruction of the property insured, the owners shall furnish the company with a notice of the loss, and a sworn statement of it, including an appraisement of its value, and other particulars set out in the policy. A compliance with these requirements is a condition precedent to the right of the assured to recover for the loss.

Edgerly vs. Farmers' Ins. Co., Iowa S. C., 43 Iowa R., 587.

See Cross Index for other cases bearing on NOTICE.

OCCUPANCY.

See USE AND OCCUPATION, VACANT.

See Cross Index for cases bearing on OCCUPANCY.

OFFICERS.

ABSTRACT OF THE LAW.

a. The officers and directors of an insurance company are simply the agents of the corporation, and the validity of their acts depends upon the powers, express or implied, conferred upon them by the charter and by-laws. Acts beyond the real or apparent scope of their authority will not be binding, and in the case of mutual companies, the insured will usually be presumed to have knowledge of the charter and by-laws. The directors and trustees are the

authorized representatives of the company, and the powers of the officers within the provisions of the charter, will be such as are conferred by them.

Baxter vs. Ins. Co., 1 Allen, (Mass.), 294; *Dawes vs. Ins. Co.*, 7 Cowen, 462; *Mound City Mut. F. and M. Ins. Co. vs. Curran*, 42 Mo., 374; *Duray vs. Ins. Co.*, 4 Zabriskie, 171; *Beatty vs. Ins. Co.*, 2 John., 109; *Troy F. Ins. Co. vs. Carpenter*, 4 Wis., 20; *Howland vs. Meyer*, 3 Comst., (N. Y.), 290; *McEvers vs. Lawrence*, 1 Hoff. Ch. (N. Y.), 172.

b. But as regards third parties, authority will usually be implied on the part of an officer, if the parties were justified in believing that he had the power.

N. Y. Cent. Ins. Co. vs. Nat. Prot. Ins. Co., 20 Barb. (N. Y.), 468; 4 Kern. (N. Y.), 85; *Keenan vs. Mo. St. Mut. Ins. Co.*, 12 Iowa, 126.

See further on this subject under, AGENT, CHARTER, DIRECTORS, MUTUAL COMPANIES.

DIGEST OF RECENT CASES.

1. A former agent of the company who issued the policy, at the request of the insured indorsed a consent to its transfer, at the same time informing the insured that he had no legal authority. The secretary of the company being shown the indorsement said it was all right. *Held*, that the secretary was one of the principal officers, and could bind the company by insurance and consent in writing or by parol. He could authorize another to write a consent.

Fish vs. Cattenet, 44 N. Y., 538; *Ellis vs. Albany City Fire Ins. Co.*, 50 N. Y., 405.

Buchanan vs. Exchange Fire Ins. Co., N. Y. Com. A., 4 Ins. Law Jour., 458.

See Cross Index for other cases bearing on OFFICERS.

OILS.

See KEEPING AND STORING, PROHIBITED RISKS.

See Cross Index for cases bearing on OILS.

OPEN POLICY.

See POLICY.

ORAL CONTRACT.

See PAROL CONTRACT.

OTHER INSURANCE.

ABSTRACT OF THE LAW.

a. Other insurance, to be valid, must be upon the same subject matter or interest, and for the benefit of the same party, with his consent. Different interests in the same subject matter, may be insured without violation of the stipulation regarding other insurance.

Harris vs. Ohio Ins. Co., 5 Ohio, 467; *Ætna Ins. Co. vs. Tyler*, 12 Wend., (N. Y.), 507; *Jackson vs. Massachusetts Mutual F. Ins. Co.*, 23 Pick. (Mass.), 418.

b. Such other insurance must be valid insurance. If by its own stipulation one of the policies has become invalid through the act of the insured in procuring other insurance or otherwise, other insurance does not exist within the meaning of the remaining policy.

Clark vs. N. E. Ins. Co., 6 Cush. (Mass.), 342; *Gale vs. Belknap County Ins. Co.*, 41 N. H., 170; *Hardy vs. Union Mutual F. Ins. Co.*, 4 Allen (Mass.), 217.

c. But a distinction has been made between policies absolutely void and such as are only avoidable at the option of the insured.

David vs. Hartford Ins. Co., 13 Iowa, 69; *Hobart vs. Hartford Ins. Co.*, 35 Iowa, 325; *Philbrook vs. Ins. Co.*, 37 Me., 137.

d. Strict concurrence of the policies as to the subject of insurance, however, has not been held in all cases necessary; it has been held in some cases sufficient, if there be a partial concurrence.

McMahon vs. Portsmouth F. Ins. Co., 2 Fost., (N. H.), 15; *Walton vs. Ins. Co.*, 2 Rob. (La.), 563; *Columbus Ins. Co., vs. Walsh*, 18 Mo., 224.

e. Stipulations as to other insurance, will be strictly construed.

Illinois Mut. Ins. Co. vs. O'Neil, 13 Ill., 89.

f. Notice of other insurance must be given when required, within a reasonable time, but its form is immaterial unless specified.

Schenck vs. Mercer County Ins. Co., 4 Zab. (N. J.), 447; *Kimball vs. Howard F. Ins. Co.*, 8 Gray (Mass.), 33.

g. When required to be indorsed upon the policy, the requirement must be strictly complied with, unless waived by an authorized agent.

Phillips vs. Agawam Ins. Co., 9 Cush. (Mass.), 470; *Carpenter vs. Providence-Washington Ins. Co.*, 16 Pet. (U. S.), 495; *Worcester Bank vs. Hartford F. Ins. Co.*, 11 Cush. (Mass.), 263.

h. But notice to an authorized agent is a waiver of strict compliance with the policy requirement.

Hayward vs. National Ins. Co., 2 Ins. L. J., 503; *Franklin vs. Atlantic F. Ins. Co.*, 42 Mo., 436; *Northrup vs. Mississippi Valley Ins. Co.*, 47 Mo., 435; *Viele vs. Germania Ins. Co.*, 26 Iowa, 55.

i. Notice of other insurance will extend to include renewals, as well as the original policy.

Baptist Society vs. Hillsborough Mutual F. Ins. Co., 19 N. H., 580; *Brown vs. Cattaraugus County Mutual F. Ins. Co.*, 18 N. Y., 385.

j. Issue of a subsequent policy is presumptive notice of a prior one issued by or through the same party.

Van Bourie vs. Ins. Co., 9 Bush. (Ky.), 133; *Barnes vs. Union Ins. Co.*, 45 N. H., 21.

k. Notice of other insurance requires immediate election by the insurer in order to invalidate the policy.

Schenck vs. Mercer County Ins. Co., 24 N. J., 417.

l. Knowledge of other insurance after the execution of the contract, not furnished by the insured, is not necessarily a waiver.

Schenck vs. Mercer County Ins. Co., *supra*; *National &c. Ins. Co. vs. Crane*, 16 Md., 269.

m. Other insurance may operate merely to suspend the policy during its existence.

N. E. F. Ins. Co. vs. Schettler, 38 Ill., 166; *Ins. Co. vs. Coatsville Shoe Factory*, 80 Penn. St., 385.

n. Parol as well as written contracts, may be other insurance.

Mason vs. Andes Ins. Co., 23 N. C., 37.

o. The decisions are not agreed whether insurance only in part, on the same subject matter, is other insurance, nor whether it works a total forfeiture.

Clark vs. Hamilton, etc., Ins. Co., 9 Gray (Mass.), 148; *Vose vs. do.*, 39 Barb. (N. Y.), 302; *Tyler vs. Ætna Ins. Co.*, 16 Wend. (N. Y.), 385; *Kimball vs. Howard Ins. Co.*, 8 Gray (Mass.), 33; *Clark vs. Hamilton Ins. Co.*, 6 Gray (Mass.), 159.

p. Knowledge of agent at the time of contracting, is a waiver of the required indorsement.

Carroll vs. Charter Oak Ins. Co., 10 Abb. Pr. U. S., 166; *Pitney vs. Glens Falls Ins. Co.*, 65 N. Y., 1; *Ætna Ins. Co. vs. Maguire*, 57 Ill., 342.

See further on this subject under ADJUSTMENT, AGENT, CONTRIBUTION, WAIVER.

DIGEST OF RECENT CASES.

OTHER INSURANCE—WHAT WILL VITLATE THE POLICY.

1. P. owned an undivided interest in wool, which he insured without any reference to joint ownership. He afterward insured in another company, with the policy clause attached, "loss, if any, one half payable to G., as his interest may appear,"—G. being the joint tenant. *Held*, that the policies attached to the same subject matter of insurance, and the second policy was other insurance with reference to the first.

Mussey vs. Atlas Ins. Co., 14 N. Y., 84; *Ogden vs. East River Ins. Co.*, 50 N. Y., 389; case of *Howard Ins. Co. vs. Scribner*, excepted to.

A renewal is not other insurance, and where the act of the agent amounted to a waiver of the required indorsement when the policy was issued, the indorsement is not required by the renewal.

Pitney vs. Glens Falls Ins. Co., N. Y. C. A., 65 N. Y., 6; 4 *Ins. Law Jour.*, 765.

2. The first policy provided that "if the insured shall have existing, during the continuance of this policy, any other contract for insurance (whether valid or not), unless consented to, etc., then this insurance shall be void." A second policy was afterward taken out, without notice, in another company, containing the usual clause against double insurance. In an action to recover on the second policy, *Held*, that the insurance in the first company was subsisting within the fair meaning of the condition in the second policy at the time that policy was obtained, and the second policy could not be held liable for property covered by the first.

Gale vs. Ins. Co., 41 N. H., 170; *Jackson vs. Mass. Ins. Co.*, 23 Pick., 418; *Clark vs. N. E. Ins. Co.*, 6 Cush., 342; *Barrett vs. Union Ins. Co.*, 7 Cush., 179.

In the opinion of the court the first policy was not rendered void because a nugatory policy constitutes no contract, and any such condition concerning an invalid contract is void for repugnancy.

Gee vs. Cheshire Co. Mut. Fire Ins. Co., N. H. S. C., 55 N. H., 65; 4 *Ins. Law Jour.*, 489.

3. The policy stipulated that if the insured made, or should thereafter make, any other insurance upon the property without the amount being indorsed on the policy, and consented to in writing by the company, the policy should be void. Other insurance was subsequently effected without notice to or consent of the company. *Held*, that the policy was avoided by the subsequent insurance.

Flanders on Ins., 41; Dig. of Fire Ins. Decisions, 390, sec. 19, 21; 1 Phillips on Ins., 481, sec. 881.

Kennedy vs. Home Ins. Co. et al., Tenn. S. C., 6 Ins. Law Jour., 359.

4. The policy, insuring an elevator belonging to plaintiff, provided that, "If the insured shall have or shall hereafter make any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon * * * then and in every such case this policy shall be void." Also, "In case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, whether such other insurance be by specific, or by general, or floating policies." Policies were subsequently taken out in other companies by the plaintiff, a railroad, "on any property belonging to the plaintiff, and on any property for which it might be liable except as common carrier or warehouseman, of whatever it might consist, or wheresoever it might be situated, provided it was on premises owned or occupied by the plaintiff or situated upon the line of its railroad." *Held*, that the subsequent policies were other insurance within the meaning of the clause, and if made without the required consent renders the first policy void.

May on Ins., 437-8; Kimball vs. Howard Fire Ins. Co., 8 Gray, 33; Bigler vs. Ins. Co., 22 N. Y., 402; Conway Tool Co. vs. Hudson River Ins. Co., 12 Cush., 144; Ramsay Woolen Cloth Mfg. Co. vs. M. F. Ins. Co. of the Dist. of Johnstown, 11 Up. Ca. Q. B., 516.

Phoenix Ins. Co. vs. Mich. Southern and Northern Ind. R. R. Co., O. S. C. Com., 28 O., 69; 6 Ins. Law Jour., 46.

5. It is the parties insured and not those to whom payment is

to be made, that are the parties bound by the terms of the policy. A designation of payment to mortgagee is not an insurance of mortgagee's interest; the latter takes it subject to the conditions on its face. The policy insured R. and his wife, loss if any payable to H. & C., mortgagees, as their interest might appear. The policy was made and accepted upon the following among other terms and provisions: "If the assured shall have or shall hereafter make any other contract of insurance, whether valid or not, on the property hereby insured, or any part thereof without the consent of the company written hereon, then, and in every such case, this policy shall become void." At the date of its issue R. held the policy of another company, which was surrendered and canceled subsequent to the issue of the policy in suit, but afterward a policy in another company was taken out in the name of the wife. Previous to the mortgage R. had conveyed the property to his wife. The company had no knowledge of this other insurance. *Held*, that the policy was avoided by the subsequent insurance without consent.

Flanders on F. Ins., 2d Ed., 488; Franklin Savings Inst. vs. Cent. Mut. F. Ins. Co., 119 Mass., 240; Fogg vs. Middlesex Mut. Ins. Co., 10 Cush., 337; Hale vs. Mechanics' Mut. Ins. Co., 6 Gray, 169; Loring vs. Manufacturers' Ins. Co., 8 Gray, 28; Ill. Mut. Fire Ins. Co. vs. Fix, 53 Ill., 151; Ill. Fire Ins. Co. vs. Stanton, 57 Ill., 354; Home M. F. Ins. Co. vs. Hauslein, 60 id., 521.

Further proof of other insurance is not necessary when its existence is shown in proofs of loss.

N. Y. Central Ins. Co. vs. Watson, 23 Mich., 482; N. A. F. Ins. Co. vs. Zaenger, 63 Ill., 464.

If the condition of a policy is broken by one only of the insured, this will render the policy void as to all.

Mussey vs. Atlas Ins. Co., 14 N. Y., 74.

When a policy contains a provision that a subsequent insurance, whether valid or not, shall render the policy of no effect, such subsequent insurance, though invalid, vitiates the policy.

L. & L. & G. Ins. Co. vs. Verdier, 35 Mich., 395; Bigler vs. N. Y. Cent. Ins. Co., 22 N. Y., 402; Lackey vs. Georgia Ins. Co., 42 Ga., 459.

Continental Ins. Co. vs. Heilman & Cox, Ill. S. C., 92 Ill., 145; 9 Ins. Law Jour., 91.

6. Before the party insured can recover his policy, the express

condition to prevent the forfeiture of the policy—which is, that the insured shall have the notice of other insurances taken upon the same property, indorsed upon the instrument, or otherwise acknowledged by the insurers in writing—must be shown to have been complied with. The propriety of such a clause in a policy of insurance is particularly apparent in this case, on account of the discrepancy of testimony. Its purpose is to enable the insurance company to protect itself, and to avoid loose and unreliable evidence of notice given to them of subsequent policies being taken out on property insured by them. The rule which excludes parol evidence in such cases is well settled and strictly adhered to.

Meyers & Winchill vs. Germania Ins. Co., La. S. C., 27 La., 63.

7. A by-law of a mutual company provided that the policy should be void in case of other insurance without consent of directors indorsed. *Held*, that the agent had no authority to consent to such insurance, and his neglect to indorse it on the policy will not aid the insured.

The Stark County Mutual Ins. Co. vs. Hurd, 19 Ohio, 149; Forbes vs. Agawam Mutual Fire Ins. Co., 9 Cush., 470; President, Directors, etc., of Worcester Bank vs. Hartford Fire Ins. Co., 11 Cush., 265; Caudary Tool Co. vs. Hudson River Ins. Co., 12 Cush., 144; Rudar vs. American Mutual Ins. Co., *ib.*, 469; Hall vs. Mechanics' Mutual Fire Ins. Co., 6 Gray, 169.

Held, that the fact that the company issuing the other insurance had not complied with the laws of the State did not make the second policy void within the meaning of the by-laws.

Walter A. Wood Mowing Machine vs. Caldwell, 54 Ind., 270. Board of Commissions of Tippecanoe County vs. Lafayette, Bloomington, and Muncie R. R. Co., 50 Ind., 85; American Ins. Co. vs. Henly, 60 Ind., 515; Daily vs. National Life Ins. Co. of the United States of America, 64 Ind., 1.

Behler vs. Germ. Mut. Ins. Co., Ind. S. C., 9 Ins. Law Jour., 778.

8. Where, in a contract of insurance which covers a storehouse and the goods therein, it is stipulated that should the assured subsequently take out a policy in any other company, the assurers should receive notice of it on pain of forfeiting their policy; a subsequent assurance of the house or goods in another company,

without notice to the assurers, will work the forfeiture of the contract with them, whether the subsequent contract was legally enforceable or not.

Allen vs. Merchants' Mutual Ins. Co., La. S. C.

WHAT WILL NOT VITIATE THE POLICY.

9. Defendant issued a policy insuring \$2,000 on plaintiff's stock of goods, and \$200 on his household goods and furniture, in one building. The whole was subsequently transferred to another town, in accordance with a permission indorsed on the policy. The policy provided, "If any other insurance has been or shall hereafter be made upon the said property, and not consented to by this company in writing hereon, this policy shall be null and void." Subsequent to the transfer, plaintiff obtained insurance in another company as follows: \$500 on the building, \$200 on household furniture, and \$75 on his general library therein. This policy provided, "that any other insurance on the property hereby insured, or any part hereof, not notified to the company, should avoid the policy." Neither company had notice of other insurance. The application to the second company stated that there was "no other insurance on the household furniture." *Held*, that the second policy, so far as respects the furniture, was void and did not constitute additional insurance within the meaning of the condition in the prior policy.

Clarke vs. New England, etc., Ins. Co., 6 Bush., 342-350; Hubbard vs. Hartford Fire Ins. Co., 33 Iowa, 325; May on Insurance, sec. 365.

Carpenter vs. Providence Ins. Co., 16 Pet., 425, distinguished.

Allison vs. Phenix Ins. Co. of Brooklyn, U. S. C. C., 4 Ins. Law Jour., 148.

10. The plaintiff, who was insured in the A. company, applied to the agent of that company to have the insurance placed elsewhere, agreeing to surrender the A. policy. The agent filled in the application for insurance in the B. company in plaintiff's name, without his knowledge, and forwarded it. The application contained a warranty that there was no other insurance. On the day following the plaintiff surrendered the A. policy to

the agent, before he had received the H. policy, and probably before it had been received by the agent. The agent had taken the surrender of other policies by direction of the A. company, and had blanks for that purpose. *Held*, that the A. policy was not in force when the H. policy applied, and the warranty regarding other insurance was not violated. *Held*, that the agent had authority to accept the surrender of the A. policy, and his subsequent failure to return the policy to the company did not affect the rights of the plaintiff against the H. company.

Former decision in the same case (5 Ins. L. J., 177).

Train vs. Holland Purchase Ins. Co., N. Y. C. A., 68 N. Y., 203; 6 Ins. Law Jour., 13.

11. Insurance was effected in the O. company, and subsequently, without notice to either, in the C. company. Each provided that in case of other insurance without notice and consent, it should be void. Plaintiff had admitted the policy of the C. company was void, and dismissed a suit against that company before bringing this suit against the O. company. *Held*, that the condition in the first policy, that if other insurance should be effected without the written consent of the company, that that policy should be void, related only to other valid insurance, and the fact that the insured attempted to effect a second insurance, which was invalid by reason of a violation of the like condition in its policy, could not have the effect of avoiding the first policy, and the company issuing said first policy is liable, notwithstanding the attempt to effect the second void policy. The second policy must, at the time of the loss, be inoperative, so that no action can be maintained on it; but it is not necessary that it shall be absolutely void. It is sufficient if it is simply voidable.

2 Pars. on Marit. Law, pp. 100, 101; Flanders on Fire Ins., pp. 49, 50; May on Ins., p. 439; Wood on Fire Ins., 586, § 348; Hubbard & Spencer vs. Hartford F. Ins. Co., 33 Iowa R., 326; Jackson vs. Mass. Mutual Ins. Co., 23 Pick., 418; Clark vs. New England Ins. Co., 6 Cusb., 343; Gale vs. Belknap Ins. Co., 41 N. H., 170; Stacey vs. Franklin Ins. Co., 2 Watts & Sergt. (Penn.), 506; Philbrook vs. New England Mut. Ins. Co., 37 Me., 137; Schenck vs. Mercer County Mut. Ins. Co., 4 Zab. (N. J.), 447; Jackson vs. Farmers' Ins. Co., 5 Gray (Mass.), 52; Gee vs. Cheshire County Mut. F. Ins. Co., 55 N. H., 65; Rising Sun Ins. Co. vs. Slaughter, 20 Ind., 520; Thomas et al. vs. Builders' M. F. Ins. Co., 119 Mass., 121; New England Ins. Co. vs. Schettler, 38 Ill., 166;

Knight vs. Eureka F. & M. Ins. Co., 26 Ohio St., 634. Cases distinguished of David vs. Hartford Ins. Co., 13 Iowa, 69; Bigler vs. New York Central Ins. Co., 20 Barb., 635, and same case, 22 New York R., 402; Lackey vs. Georgia Ins. Co., 42 Ga., 457; Carpenter vs. Providence Washington Ins. Co., 16 Peters, 497.

Sutherland vs. Old Dominion Ins. Co., Va. S. C. A., 8 Ins. Law Jour., 181.

12. A policy taken out by a stranger on a separate interest in the property is not other insurance. Where such policy is void through misstatements, it would not work a forfeiture even if on the same interest.

City Five Cents Savings B'k vs. Penn. Ins. Co., 122 Mass., 165; Jackson vs. Massachusetts Ins. Co., 23 Pick., 418; Thomas vs. Builders' Ins. Co., 119 Mass., 121.

Wheeler vs. Watertown F. Ins. Co., Mass. S. J. C., 10 Ins. Law Jour., 354.

13. Plaintiff, while at the office of the agent on other business, was told that he had no insurance on the property afterward burned, and that he ought have it insured. Plaintiff responded that if not insured he desired it insured, but did not wish it insured twice, and signed a blank application and a premium note, which the agent afterward filled up and forwarded to the company. A policy was returned by the L. company stipulating that it should not go into effect until the cash premium was paid, and should be void in case of non-payment of any assessment on the note within 30 days, or in case of other insurance not disclosed. The premium was paid by the agent, an assessment was mailed to insured, but whether received or not, was never paid by insured, from whose mind the whole matter passed, and who had forgotten that he held a prior policy in the Q. company also stipulating against other insurance. *Held*, in a suit against the Q. company that there was a mutual mistake of the parties regarding the L. policy, and neither could be held to the contract. It was unnecessary to go into a court of equity to set aside the policy which had never been delivered by the agent and had been marked canceled. *Held*, that the L. policy was not other insurance which avoided the Q. policy.

Gibson vs. Union Rolling Mill Company, 3 Watts, 32, 37; Kelly vs. Solari, 9 Mees. & Wels., 54, 58; Story's Eq. Jur., sections 134, 140, *et seq.*

Wilson vs. Queen Ins. Co., U. S. C. C. Pa., 10 Ins. Law Jour., 137.

14. Where the policy stipulated that it should be void in case of additional insurance without consent, such additional insurance works a forfeiture, although the second policy stipulates that it should be void in case of prior insurance. The second policy is not void, *ab initio*, but only voidable, and whether so or not is of no consequence.

Baer vs. Phoenix Ins. Co., 4 Bush., 242.

Suggs vs. Liverpool & London & Globe Ins. Co., Ky. C. A., 9 Ins. Law Jour., 657.

15. The policy provided that if the said assured, or their assigns, shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to this company, and have the same indorsed on this instrument by the secretary, or otherwise acknowledged by them in writing, then this policy shall cease and be of no further effect. Other policies were subsequently procured without consent, but it appeared that they contained a stipulation regarding title, which had been violated. *Held*, that these policies as between the parties, were void *ab initio*.

Mut. Ass. Soc. vs. Holt, 29 Gratt., 612.

Held, that the taking out of the other policies was but an abortive attempt to procure other insurance, which did not violate the provision, and the fact that claims were recognized and paid under the void policies did not estop the insured from setting up that they were void.

Stacy vs. Franklin Ins Co., 2 Watts and Serg., 506; Jackson vs. Mass. Mut. Ins. Co., 23 Pick., 418; Philbrook vs. New Eng. Ins. Co., 37 Me., 137; Lindley vs. Union Mut. Ins. Co., 65 Me., 368; Gale vs. Belknap Ins. Co., 41 N. H., 170; Gee vs. Cheshire Co. Mut. F. Ins. Co., 56 N. H., 65; Schenck vs. Mercer Co. Ins. Co., 4 Barb., 448; Thomas vs. Builders' M. F. Ins. Co., 119 Mass., 121; Sutherland vs. Old Dominion Ins. Co., 8 Ins. Law Journal (No. 3), 191; Hubbard & Spencer vs. Hartford F. Ins. Co., 33 Iowa, 325; 29 Gratt., *supra*; Knight vs. Eureka Ins. Co., 26 Ohio St., 664.

Excepting to Carpenter vs. Providence Insurance Co., 19 Peters, 495; Big-

ler vs. N. Y. Cent. Ins. Co., 22 N. Y., 402; Jacobs vs. Eq. Ins. Co., 19 Upper Canada, 250.

Firemen's Ins. Co. vs. Holt, O. S. C., 35 O., 189; 9 *Ins. Law Jour.*, 212.

16. The stipulations in a policy against other insurance, are not violated by "other insurance" which is not legal insurance. The true issue is whether the policy which is said to violate the stipulation was really binding on the insurer. When the insured signs a printed form of application, filled up by agent of the company, which he was not asked to read, and which he is not given time to read intelligently, the fact that such form contains a misrepresentation of a material fact will not necessarily defeat a recovery where the insured appears to have acted in good faith, and to have answered truly and frankly all inquiries made of him by the agents of the company at the time of the insurance.

Dahlberg vs. St. Louis F. & M. Ins. Co., St. Louis (Mo.) C. A., 7 *Ins. Law Jour.*, 719.

17. The question upon which the appeal was determined was, whether or not the appellant, being insured in the Western Insurance Company to the extent of \$2,000, which formed a portion of a sum of \$8,000, further insurance mentioned in the policy sued upon, having allowed the Western's assurance policy to expire, could insure for the same amount in the Queen company, without the consent of the respondent company. The policy had indorsed upon it the following conditions: "The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent appears herein, or is indorsed thereon, nor if any subsequent insurance is effected in any other company, unless, and until, the company assent thereto in writing signed by a duly authorized agent." *Held*, on appeal, that as the policy on its face allowed additional insurance to the amount \$8,000 over and above the amount covered by the policy sued on, the condition as to subsequent insurance must be construed to point to *further* insurance beyond the amount so allowed, and not to a policy substituted for one of like amount allowed to lapse.

Parsons vs. The Standard Fire Insurance Co., Supreme Court of Canada.

18. These four actions were each founded on a policy of insurance for \$2,500, on the theater in Louisville formerly owned by the plaintiff, but owned when the original policies, of which these are renewals, were issued, by F. The plaintiff sold the theater to F., reserving a small rent of \$100 per annum and a lien of \$26,250 of balance of the purchase money, and the deed of transfer also contained a clause providing that F. should keep the property insured for four years in the sum \$10,000, and assign the policy to plaintiff to secure the payment of F.'s indebtedness to him. F. procured the insurances in the several companies of the several defendants, \$2,500 in each. Subsequently F. sold the property to M. and two others for \$75,000, retaining a lien for \$50,000 of unpaid purchase money, and providing that the said purchasers should procure insurance in \$10,000, loss if any payable to F., which was done without notice to defendants, in violation of the provision against other insurance. Again, M., soon after the purchase from F. by the three (himself and two others), bought out the other two purchasers, and at the time of the fire owned the whole of the property subject to the lien aforesaid in favor of F.

The companies set up as a defense the procurement of other insurance without permission, and the Buckeye Insurance Company, as a fifth defense, alleged that the transfer of the property from F. to M., etc., was in direct contradiction with the condition of its policy, which stated that in case of any transfer or change of interest of the insurer, either by sale or otherwise, without consent of defendants, the policy shall thenceforth be void, and of no effect. The policies of the other three companies did not contain the clause. *Held*, that the risk was not in any measure increased by the change of ownership. *Held*, that the failure of F. to represent the fact of his sale to M., and the further fact that M. procured the insurance in his own name was not a misrepresentation or a concealment of a fact material to the risk. Nor was there such want of representation of plaintiffs relative to the property, and to F. as to impair the validity of these policies. The words assignees as used in the clause of the policy—which reads as follows: “If the said insured or assignees shall hereafter make any other insurance upon said property”—means not assignees nor transferees of the property, but of the policy.

Holbrook vs. American Ins. Co., 1 Cur. 193; Wilson vs. Hill, 3 Met. (Mass.), 66-68.

The question of other insurance is not in this case affected by the words assigns, as there are no assigns of these policies who have obtained other insurance. The policies obtained by M. on his interest in the property, loss if any payable to F., to secure the payment of purchase money, were not other insurance made by F. or assigns upon the said property, and therefore do not fall within the prohibition of the clause in the policy. *Held*, that the Buckeye policy was forfeited by a transfer or change of interest of the insurer.

Bates vs. Buckeye Ins. Co. et al., Cin. (O.) Sup. Ct., 4 Ins. Law Jour., 716.

19. A fire policy was effected on "wool in any shed or store, or station or in transit to Sidney by land only, or in any shed or store, or on any wharf in Sidney, until placed on board ship," providing also that it should be void in case of other insurance without notice. Subsequently, without notice, a marine policy was effected, "lost or not lost, at and from the river Hunter to Sidney, per ship or steamers, and thence per ship or steamers to London, including the risk of craft from the time that the wools are first water borne, and of transshipment and landing and reshipment at Sidney." The goods were damaged by fire while in store in Sidney, whence they had been brought down the river in steamers, and while waiting shipment to London. *Held*, that there was not double insurance. The risk was one which was covered by the first policy, but not by the second.

Australian Agricultural Ins. Co. vs. L. L. and G. Ins. Co., Eng. C. E.

20. Where there is a stipulation in a policy that the policy shall be void if the insured shall subsequently make insurance on the same property, and shall not give notice thereof with all reasonable diligence to the insurers, and have the same indorsed on his policy or otherwise acknowledged by them, if the second policy is void, it will not defeat the first, even though the subsequent insurers, after a loss, pay to the insured a sum of money by way of compromise of his claim thereon. And where it

appears that the loss was accidental, and there is nothing to show that the subsequent insurance materially increased the risk, the plaintiff's claim on the first policy could not be defeated even by a valid subsequent insurance. Such a breach of the terms of the policy by the insured is within the purview of R. S., c. 49, §§ 19 and 20.

Lindley vs. Union Ins. Co., Me. S. J. C., 65 Me., 368.

21. Where a policy contains a prohibition against additional insurance without the consent of the insurer written thereon; if notice of such additional insurance be given to an agent of the insurer and he assents thereto, it will be sufficient, though his assent be verbal only.

Baile vs. St. Joseph F. & M. Ins. Co., Mo. S. C., 10 Ins. Law Jour., 657.

22. F. was "soliciting agent" for defendant and another insurance company, with authority from defendant, as "soliciting agent," to receive and forward for its approval applications for insurance. B. applied to him, at the same time, for insurance upon the same property against fire in both companies. The agent filled up the application to defendant, which was signed B., explaining to him how the question in regard to other insurance should be answered. The application did not mention the contemplated assurance in the other company, but the agent was to notify defendant of it. Upon this application defendant issued its policy, and sent it to F. for delivery. He delivered it at the same time with the policy of the other company, defendant's policy not having indorsed on it a consent to such other insurance. *Held*, that defendant was chargeable with its agent's knowledge of the application for and issuance of the policy of the other company, and that, by delivering its policy without indorsing its consent to the other insurance, it waived as to such other insurance a condition in its policy avoiding the policy in case of other insurance unless its consent thereto were indorsed on the policy.

Malleable Iron Works vs. Phoenix Ins. Co., 25 Conn., 455; Sanford vs. H., 23 Wend., 260; Nelson vs. Cowing, 6 Hill, 336; Moliero vs. Pa. Fire Ins. Co., 5 Rawle, 342; Wood on Ins. § 386.

Brandup vs. St. Paul F. & M. Ins. Co., Minn. S. C., 10 Ins. Law Jour., 228.

23. A policy of insurance against fire which contains a provision that if the assured "shall have made or shall hereafter make any other insurance upon said property without the knowledge or consent of this company in writing, then in such case this policy shall be void," it is not defeated by the taking of a subsequent policy which is invalid by reason of the failure of the assured to obtain the assent of the company issuing it, to the existence of other insurance upon the property, as required by the terms of that policy, and the assured may set up the invalidity of the second policy, in an action by him upon the first policy, although he has received payment of the second policy from the insurer.

Thomas vs. Builders' Ins. Co., Mass. S. J. C., 119 Mass., 121.

WHAT IS A WAIVER.

24. An adjustment, with full knowledge of the fact that other insurance had been obtained without consent, is a waiver of the policy stipulation requiring such consent.

Lery vs. Peabody Ins. Co., W. Va. S. C. A., 6 Ins. Law Jour., 769.

25. Where a contract for intermediary insurance, and for a policy on the same risk, is made subject to the conditions in the printed policy, a condition in the policy that all additional insurance, whether prior or subsequent, shall be mentioned in or indorsed on the policy, does require that either prior or subsequent insurance should be mentioned in or indorsed on the contract. A condition in a contract for insurance requiring notice of prior insurance, is waived by accepting the risk on the application, in which the question concerning prior insurance is not answered.

21 Ohio St., 176; 6 Gray, 85.

Notice of additional insurance required to be given to the insurer, may before the receipt of the policy be given to the agent of the insurer who effected the insurance, where he is also intrusted with the delivery of the policy in fulfillment of the contract; and his indorsement of such additional insurance upon the policy is the act of the company. Where a company, in compliance with a contract to insure, procured the policies of

other companies, and forwarded them to its agent, and the agent afterward agreed to additional insurance, and indorsed it on the policies. *Held*, that the agent, though authorized to act for his principal, could not bind the other underwriters. It was the duty of the insurer to obtain the assent of the other underwriters,

Dayton Ins. Co. vs. Kelly, Ohio S. C., 24 O., 345; 4 Ins. Law Jour., 169.

26. An agent having power to indorse written consents, may, by express words or implication, give oral consent to other insurance on a policy which requires the consent to be a written indorsement, whether such consent be prior or subsequent to the attachment of the risk.

Lord Strange vs. Smith, Amb., 263; Worthington vs. Evans, 1 Sim. & Stuart, 165; Pollock vs. Croft, 1 Min., 181; Campbell vs. Netterville, 2 Ves., 534; Ins. Co. vs. Wilkinson, 13 Wallace, 236. Cases of Roe vs. Harrison, 2 Term Rep., 425; Littler vs. Holland, 3 ib., 590; Martin vs. Foundling Hospital, 1 N. B., 191; Richardson vs. Evans, 3 Maddock, 218, distinguished. Case of Carpenter vs. Washington Ins. Co., 16 Peters, 495, excepted to. May on Ins., §§ 369-370.

Pechner vs. Phoenix Ins. Co., N. Y. C. A., 65 N. Y., 195; 4 Ins. Law Jour., 782.

27. Where other insurance has been obtained without the required consent, and the first insurer on being informed, raises no objection other than asking why it was not obtained from him, and treats it as a matter of course, he is estopped from repudiating his liability after a loss.

Westchester Fire Ins. Co. vs. Earle & Reynolds, Mich. S. C., 33 Mich., 14; 5 Ins. Law Jour., 61.

28. If the agent of an insurance company, empowered to take risks and issue policies, knows, when he issues a policy, that there is other insurance upon the property, his failure to write the company's consent thereto in the instrument will not defeat an action thereon, although the policy itself declares that it shall be void in case the assured "shall have or shall hereafter make any other insurance upon the property without the consent of the company written herein;" and also declares that "the use of general terms, or anything less than a distinct, specific agreement, clearly expressed and indorsed upon the policy, shall not be con-

strued as a waiver of any printed or written restriction therein." The question of fact was, whether defendant's agents, when they issued the policy in suit for \$1,200, knew that there was other insurance upon the property for \$600; and there was conflicting evidence upon that question. It being stipulated that the value of the property when the policy was issued was only \$1,800, defendant's said agents, as witnesses in its behalf, were asked, 1, Whether there was any rule of the company which they followed in insuring property, in reference to the *amount* of insurance; and 2, Whether, assuming the value of the property to have been \$1,800 and no more, with \$600 already upon it, they would have put \$1,200 more upon it. *Held*, that it was error to reject the evidence.

Roberts vs. Continental Ins. Co., Wis. S. C., 41 Wis., 321; 6 Ins. Law Jour., 248.

29. The policy provided that it should be void in case of other insurance, without the consent of the company written therein. Subsequently the agents wrote to the insured in answer to a letter: "We will of course allow other concurrent insurance, and will also place you more insurance at the same rate. * * Trusting to hear from you at your earliest convenience," etc. *Held*, that this was not a consent to a specific additional insurance, which authorized the insured to procure it on his own responsibility, without further notification to the agents or the company. *Held*, that the policy was avoided by procuring such insurance.

N. Y. Cent. Ins. Co. vs. Watson, 23 Mich. 416, and cases there cited.

Allemania Ins. Co. vs. Hurd, Mich. S. C., 37 Mich., 11; 7 Ins. Law Jour., 169.

30. At the time of the issuing of defendant's policy, additional insurance was taken out upon the property in another company, with the same agent, and with the consent of the defendant indorsed upon the policy. Thereafter another company was substituted by the same agent in place of the second insurer, with the knowledge of the first, and without objection. *Held*, that the fact that the substitution was made by defendants' agent, with defendants' knowledge, and without their objection, constitutes a waiver of the stipulation in the policy of defendants that no addi-

tional insurance should be placed upon the property insured, unless the consent of the company was indorsed upon its policy.

Wood on Ins., sec. 496, 497.

Collins vs. Farmville Ins. and Banking Co., N. C. S. C., 8 Ins. Law Jour., 453.

31. An insurance company which denies its liability on the policy on the ground of other insurance, may thereby waive the condition as to proofs of loss, but does not necessarily waive other conditions of the policy. If a company so acts as to induce a belief that it has consented to other insurance, this is a waiver of the policy provision prohibiting it without consent. Facts claimed as a waiver must be set up specially by way of answer in Texas, and must be such as amount to an agreement or estoppel.

Bigelow on Estoppel, p. 505; *Tex. B. & I. Co. vs. Stone*, 49 Tex., 4; *Merchants' Mut. Ins. Co. vs. Lacroix*, 45 Tex.

Galveston Ins. Co. vs. Heidenheimer Bros., Tex. S. C., 9 Ins. Law Jour., 592.

32. There was a prior policy providing that it should be void in case of other insurance without notice. No notice was given, and no claim made on account of the first policy. *Held*, that the first policy being void, the second was not relieved of its obligation to pay the whole loss, by its contribution clause.

Hand vs. Williamsburgh City Ins. Co., N. Y. Com. A., 3 Ins. Law Jour., 525.

EVIDENCE RELATING TO.

33. The policy was procured from the agent of the company by a broker. The broker knew of other insurance, but it was not indorsed on the policy as required. After the fire the agent participated in the adjustment, and tacitly acquiesced in the apportionment, promising to pay, and tendering back the unearned premium, reserving the earned portion. Afterwards he refused to pay, because his company would not consent. The policy provided for the apportionment of appraisers, but stipulated that their award should not determine any question as to the liability of the

company. Both the agent and broker had died before the suit. *Held*, that evidence of insured as to conversations with the broker regarding the other insurance was admissible as part of the *res gestæ*, and as evidence that the knowledge had been communicated to the agent. *Held*, that the company was liable; the agent had tacitly acquiesced in the apportionment, and by his acts had misled insured into releasing the co-insurers from their proportion, he had failed to object in time to the other insurance, and he had retained the earned premium, which was in bad faith.

Fischbeck vs. Phenix Ins. Co., Cal. S. C., 9 Ins. Law Jour., 511.

34. The policy provided that it should be void if other insurance was obtained which was not consented to and indorsed on the policy. Permission was given for \$6,500 of insurance. There was other insurance for \$8,000. *Held*, that parol evidence was admissible to show that the company agreed to issue the policy, with permission for \$8,000 other insurance, but by mistake failed to do so, and to estop the company from setting up the terms of the contract as a defense.

McBride et al. vs. Republic Fire Ins. Co., 30 Wis., 562; Parker et al. vs. Amazon Ins. Co., 34 Wis., 363; Franklin vs. Atlantic Fire Ins. Co., 42 Mo., 456; Combs vs. Hannibal Savings and Ins. Co., 43 Mo., 148; Peck et al. vs. New London Co. Mut. Ins. Co., 22 Conn., 575; Hough vs. City Ins. Co., 29 Conn., 10; Rowley vs. Empire Ins. Co., 36 N. Y., 550; Devine vs. Home Ins. Co., 32 Wis., 471; Plumb vs. Cattaraugus Ins. Co., 18 N. Y., 392; Bevin vs. Conn. Mut. Life Ins. Co., 23 Conn., 244; Ins. Co. vs. Wilkinson, 13 Wall., 222, 223; Van Bories vs. United L. F. and Mut. Ins. Co., 8 Bush., 133; Horwitz vs. Equitable Mut. Ins. Co., 40 Mo., 557; Wilson vs. Conway Ins. Co., 4 R. I., 141. Cases of Barrett et al. vs. Union Mut. Fire Ins. Co., 7 Cush., 175; Pendar vs. Am. Mutual Ins. Co., 12 Cush., 469; Jennings vs. Chenango Mnt. Ins. Co., 2 Denio, 75, excepted to.

Greene vs. Equitable F. & Mut. Ins. Co., R. I. S. C., 6 Ins. Law Jour., 351.

35. Where evidence tending to show that other insurance was invalid for want of authority on the part of the company, was excluded, the defendant cannot complain where the validity of such insurance was an essential element in its defense.

Bardice'l vs. Conway Mutual Fire Ins. Co., Mass. S. J. C., 118 Mass., 465, and 122 Mass., 90; 6 Ins. Law Jour., 413.

36. Where forfeiture was claimed on the ground of subsequent insurance, it was error to admit evidence that the latter was taken out in the belief that the prior policy was invalid. The motive does not affect the question of breach of contract. But the error was cured by subsequent instruction that the first policy was avoided unless there was a waiver of the breach. Evidence of the amount paid by the subsequent insurer in a suit against the first was not error; it proved neither the loss nor the extent of it against the first company, but simply what had been paid in reduction of their risk. Evidence that the company, after offering to compromise, called on the plaintiff to make out proofs, and required their correction on other grounds without alluding to the subsequent insurance, was evidence from which a jury might find a waiver of the condition regarding subsequent insurance.

Graves vs. Ins. Co., 43 Wis.

Pennsylvania F. Ins. Co. vs. Kittle, Mich. S. C., 39 Mich., 51; 8 *Ins. Law Jour.*, 365.

WHAT IS NOT A WAIVER.

37. The policy provided that it should be void in case of other insurance without consent. In response to a communication from plaintiff, the company wrote to its agents that it was impossible to ascertain, from the communication, the object of the writer, for it did not even state that he held a policy in the company, and requesting the agent to inform him that any claim against the company must be made in strict compliance with the terms of his policy. *Held*, that the letter was not a waiver of the policy provision, although the company knew that it had been violated; the company was not bound to act until the plaintiff asserted his claim. Upon the presentation of defective proofs, plaintiff was notified that, if he had a claim, the proofs must be made in accordance with the policy provisions, and he was at the same time notified that he had violated the condition concerning other insurance, and the company would rely upon the forfeiture. *Held*, that it was the duty of plaintiff to furnish sufficient proofs, and his expense in perfecting them under the circumstances did not estop the company from relying on the forfeiture.

Cases distinguished of *Webster vs. Phoenix Ins. Co.*, 36 Wisconsin, 71; *Gans vs. St. Paul F. & M. Ins. Co.*, 43 Wis., 110; *Trenton Ins. Co. vs. Shea & O'Connell*, 6 Bush.; *Van Bories vs. United L. F. & M. Ins. Co.*, 8 Bush., 136; *Baer vs. Phoenix Ins. Co.*, 4 Bush., 244.

Held, that the company was not obligated to return any portion of the unearned premium in order to rely on the forfeitures.

Phoenix Ins. Co. vs. Stevenson, Ky. C. A., 8 *Ins. Law Jour.*, 922.

38. Information of other insurance, to the broker who procured the policy and was accustomed to dealing with the company and with others, deducting his commission from the premiums, was not information to the company which waived a forfeiture.

Lange vs. Lycoming F. Ins. Co., St. Louis (Mo.) C. A.

See Cross Index for other cases bearing on OTHER INSURANCE.

PAROL CONTRACT.

ABSTRACT OF THE LAW.

a. Parol contracts are equally valid as if in writing.

Angell vs. Hartford Ins. Co., 59 N. Y., 171; *Kohn vs. Ins. Co. of N. A.*, 1 Wash. C. C. (U. S.), 93.

b. But the contract must be complete, and the minds of the parties must have met upon all the essentials. If anything remains to be done or decided upon, the contract is incomplete.

Hughes vs. Mercantile Ins. Co., 55 N. Y., 265; *Sun Mutual Ins. Co. vs. Wright*, 23 Ohio, 412; *Train vs. Holland Purchase Ins. Co.*, 3 N. Y. S. C., 777.

c. A provision in the charter requiring contracts of insurance to be in writing, does not prevent valid parol contracts for insurance.

N. E. Ins. Co. vs. Robinson, 23 Ind., 536.

d. Such contracts will be enforced in equity.

Commercial Ins. Co. vs. Ins. Co., 19 How. (U. S.), 318; *Lightbody vs. N. A. Ins. Co.*, 23 Wend. (N. Y.), 18; *Kelly vs. Com. Ins. Co.*, 10 Bos. (N. Y.), 82.

e. In case of parol contract, however, the burden of proof is on the insured.

McCann vs. Aetna Ins. Co., 3 Neb., 198; *Hartford F. Ins. Co. vs. Wilcox*, 57 Ill., 180.

f. Contracts may be renewed, as well as made and modified, by parol.

Ludwig vs. Jersey City Ins. Co., 48 N. Y., 379.

g. The burden is on the insured to show authority of the agent to contract by parol.

McCann vs. Aetna Ins. Co., *supra*; *Hamilton vs. Home Ins. Co.*, 6 Biss. (U. S.), 9.

h. Full agreement upon all the terms of the parol contract is not always essential, where established custom or the usual course of dealing between the parties will enable a court to supply the deficiency.

Walker vs. Metropolitan Ins. Co., 56 Me., 371; *Teutonia Ins. Co. vs. Anderson*, 77 Ill., 382; *Hemingway vs. Bradford*, 14 Mass., 121; *Wood vs. Poughkeepsie Ins. Co.*, 32 N. Y., 619.

i. Payment of premium is not essential to a valid parol contract unless specially required.

Davenport vs. Peoria Ins. Co., 17 Iowa, 276; *Post vs. Aetna Ins. Co.*, 48 Barb. (N. Y.), 851; *Hamilton vs. Lycoming Ins. Co.*, 5 Penn. St., 339.

j. A charter provision requiring prepayment of premium will not affect the validity of a parol contract unless known to the insured.

Callahan vs. Atlantic Ins. Co., 1 Edwards Ch. (N. Y.), 64; *Flinn vs. Ohio Ins. Co.*, 8 Ohio, 501.

See further on this subject under AGENT, APPLICATION, CONTRACT, POLICY, PREMIUM.

DIGEST OF RECENT CASES.

PAROL CONTRACT—WHEN VALID.

1. Except where prevented by the operation of the statute of frauds, or some other equivalent prohibition, a policy of insurance may be made or changed by parol.

16 Gray, 438; 10 Bos., 81; 27 N. Y., 216; 13 Allen, 320.

The fact that a policy is written, does not prevent its change by subsequent parol agreement. Any written contract not within the statute of frauds may be changed by parol. And this has been applied to the enlargement and continuance of policies.

Seaman vs. O'Hara, Mich. S. C.; 6 Gray, 209; 19 N. Y., 305.

Westchester Fire Ins. Co. vs. Earle & Reynolds, Mich. S. C., 33 Mich., 14; 5 Ins. Law Jour., 61.

2. A court of equity will compel the issuance and delivery of a policy after a loss where there had been a valid agreement for one before, and will enforce the payment of it as if made in advance. This will be done where the contract was by parol, and even where the company's charter requires all contracts to be in writing.

Franklin Ins. Co. vs. Colt, 4 Ins. L. J., 367; 42 Mo., 38; 17 Iowa, 277; 2 Dutcher, 268; 42 Maine, 257; *Phoenix Ins. Co. vs. Hoffheimer*, 46 Miss., 657.

Where the local agent having taken an application, did not in-

form the insured that it must be forwarded for approval, but informed the insured and led him to believe the assurance was complete, it will be regarded as a valid contract and enforced.

Franklin Fire Ins. Co. vs. Taylor et al., *Miss. S. C.*, 52 *Miss.*, 441; 5 *Ins. Law Jour.*, 671.

3. An agent furnished with blank policies which he is authorized to fill up and deliver and make binding until canceled, has also authority to make preliminary executory contracts by parol. In order to a valid parol contract, the subject of insurance, the time, amount, and premium must be shown to be agreed on. Evidence of an agreement to replace a certain policy in the H. company at its expiration by a policy in the L. company, at a specified rate, is evidence of a valid parol contract.

Linsley vs. Lovely, 26 *Vt.*, 123, distinguished.

It was claimed that the policy, if issued according to agreement, would have been invalidated by things shown to exist in connection with the policy. *Held*, that the agreement having been made by the agent with full knowledge of the facts, was valid.

Brink vs. Ins. Co., 49 *Vt.*, 453.

Proofs of loss had not been made within the time that would have been required by the policy if issued in the contemplated form. *Held*, that a refusal to issue the policy was a denial of liability and a waiver of the condition requiring such proofs.

Ins. Co. vs. Colt, 20 *Wall.*, 560; *Sanborn vs. Firemen's Ins. Co.*, 16 *Gray*, 453.

Weeks vs. Lycoming Ins. Co., *U. S. C. C. Vt.*, 7 *Ins. Law Jour.*, 552.

4. The evidence tended to show an oral agreement to insure with the local agent intended to be binding, and that the premium was agreed on. The agent had frequently issued policies on similar risks, and was furnished with the necessary blanks. The delivery of the policy was delayed until the special agent should inspect the building and determine the desirableness of the risk. *Held*, that an oral as well as a written contract may be binding.

Sanborn vs. Firemen's Ins. Co., 16 *Gray*, 448.

Held, that there was sufficient to justify a finding of an oral agreement within the scope of the agent's authority, which was binding on the company so long as it had not been terminated by the latter.

Baxter vs. Massasoit Ins. Co., 13 Allen, 320.

Putnam vs. Home Ins. Co., *Mass. S. J. C.*, 123 *Mass.*, 324; 7 *Ins. Law Jour.*, 550.

5. Where there is an oral agreement for an insurance, and a fire occurs which destroys the property before the policy is issued, the policy being issued and dated at the time of the oral agreement, the insurance will be effective. Nor is it a fraud for the owner not to disclose the fact of the fire to the agent before the issuing of the policy.

Mann, receiver, vs. Meyer, 8 *Ins. Law Jour.*, 905.

6. The insured applied for insurance to the agent, who was authorized to issue policies, and who was supplied with policies regularly executed to be filled up by him. The terms were agreed on and the premium tendered, but declined by the agent on the ground that he had already sufficient funds belonging to the insured, which he would apply, and that after writing to wife of insured, who was absent, to learn if she had not already procured insurance elsewhere, he would immediately issue the policy. The agent wrote and was answered by the wife that no insurance had been effected, but he neglected at once to issue the policy, and early on the day following the building was burned. The policies of the company provided that they should not be binding until the actual payment of premium to the company or a duly authorized agent. *Held*, that the proper remedy for the insured was in equity for specific performance, and for the issue of a proper form of policy and for general relief, and a court of equity having acquired jurisdiction will proceed to do final justice between the parties.

Tayloe vs. Merchants' Fire Ins. Co., 9 How. U. S. R., 390; *Conn. Mut. Marine Ins. Co. vs. Union Mut. Ins. Co.*, 19 How. U. S. R., 318; *Post vs. Ætna Ins. Co.*, 43 Barb. R., 351.

Held, that the tender and agreement under the circumstances was a sufficient payment of premium.

Hallock vs. Conn. Ins. Co., 2 Dutcher (N. J.) R., 268; New York Central Ins. Co. vs. National Protection Ins. Co., 20 Barb. R., 468; Chickering vs. Globe Mutual Life Ins. Co., 116 Mass. R., 321; Goit vs. National Protection Ins. Co., 25 Barb. R., 189. Distinguishing cases of Buffum vs. Fayette Mnt. F. Ins. Co., 3 Allen R., 360; Hoffman vs. John Hancock Mut. Life Ins. Co., 92 U. S. R. (2 Otto), 151; Ferebee vs. N. C. Mut. Home Ins. Co., 68 N. C. R., 11; Boston vs. Amer. Mut. Life Ins., 25 Conn., 542; Sheldon vs. Conn. Mut. Life Ins. Co., 25 Conn., 207.

Held, that the case was not affected by a doubt in the agent's mind, not as to the actual understanding with insured, but as to its legal effect, which led him not to report the loss to the company.

Woody vs. Old Dominion F. Ins. Co., Va. S. C. A., 9 Ins. Law Jour., 276.

7. A contract for insurance may be effected by parol.

City of Davenport vs. Peoria F. & M. Ins. Co.

Evidence in this case showed a valid contract for insurance in the company of plaintiff. In an action in equity by an insurance company to cancel a policy written by one of its agents in conformity with a parol agreement upon the ground that it was wrongfully and fraudulently issued after the loss: *Held*, that a loss under such policy might be set up in the answer as a counter claim, and upon denial of relief for vacation of policy, judgment for the amount of such loss ordered.

Bliss on Code Pleading, § 126; Woodruff vs. Sarnier, 27 Ind., 4.

Revere F. Ins. Co. vs. Chamberlin et al., Iowa S. C., 10 Ins. Law Jour., 397.

8. Both at common law and under the statute of this State, a verbal agreement to insure is binding, and in case of loss will be specifically enforced against the insurer.

Mar. Ins. Co. vs. Mut. Ins. Co., 19 How., 319; May on Ins., §§ 14, 22, 23, 128; Kelly vs. Commonwealth Ins. Co., 10 Bosw., 82; Sanborn vs. Firemen's Ins. Co., 16 Gray, 448; Trustees vs. Brooklyn Fire Ins. Co., 19 N. Y., 305; Relief Fire Ins. Co. vs. Shaw, 94 U. S., 574; New England, etc., vs. Robinson, 25 Ind., 536; 56 Mo., 371; Henning vs. Ins. Co., 2 Dill. C. C., 26. Distinguishing Henning vs. United States Ins. Co., 47 Mo., 425.

The only element of a valid contract of insurance not expressly agreed upon in this case, was the risk. The insuring company, however, was only authorized to insure against fire

on land and marine risks elsewhere, and the subject matter of the insurance was a stock of goods in store. *Held*, that from this it could properly be inferred that the risk insured against was fire.

Eureka Ins. Co. vs. Robinson, 56 Pa. St., 256.

The method of enforcing specific performance of a verbal contract to issue a policy of insurance after a loss has occurred, is not to compel the issuance of the policy, but to decree payment of the money as if the policy had issued.

May on Ins., § 565, and cases cited; *Real Est. Sav. Inst. vs. Colloniers*, 63 Mo., 690.

It is no defense to an action to compel specific performance of a contract to issue a policy of insurance, that the policy, if issued, would have contained a prohibition against additional insurance without the consent of the insurer written on the policy, and that the plaintiff had obtained additional insurance without such consent. It is no defense to an action to compel specific performance of a contract to issue a policy of insurance, that the policy if issued would have contained a requirement that in case of loss the insurer should be forthwith furnished with proofs of loss, and that plaintiff had not complied with this requirement. If an insurance company, whose agent has made a verbal contract to issue a policy, upon being applied to for the policy by the party entitled, after a loss has occurred, refuses to issue the policy on the ground that it is not liable on the contract, it cannot afterward defend on the ground that proofs of loss were not furnished in time.

Tayloe vs. Ins. Co., 9 How., 209, and cases cited; *McComas vs. Ins. Co.*, 56 Mo., 573; *May on Ins. Co.*, §§ 468, 469; *Franklin F. Ins. Co. vs. Coates*, 14 Md., 285; *Newmark vs. Ins. Co.*, 30 Mo., 160.

Baile vs. St. Joseph F. & M. Ins. Co., *Mo. S. C.*, 10 *Ins. Law Jour.*, 657.

WHEN NOT VALID.

9. A verbal arrangement with an agent for insurance, in which the time the insurance was to run, and the premium rate, were left subject to future adjustment, does not constitute a valid parol contract. To constitute a valid contract of insurance the minds of

the parties must meet as to the premises insured, the risk, the amount insured, the time the risk should continue, and the premiums.

Baptist Church vs. Brooklyn Fire Ins. Co., 28 N. Y., 153 ; *Audubon vs. Excelsior Ins. Co.*, 27 N. Y., 216 ; *Kennebec Co. vs. Augusta Ins. Co.*, 6 Gray, 204 ; *Walker vs. Metrop. Ins. Co.*, 59 Me., 391, distinguished.

The principle of a promissory note or check, silent as to time, cannot be applied to a contract of insurance. Proof of usage of a company, in its dealings with other parties, is immaterial when no complete contract has been made.

Strohn et al. vs. Hartford Fire Ins. Co., *Wis. S. C.*, 37 *Wis.*, 625 ; 4 *Ins. Law Jour.*, 680.

10. To bind a company by interim parol contract, the company must not only have made the contract, but the contract must be clearly established. The power of the agent to bind the company must plainly appear. Where the risk had not yet been accepted by the company and no premium had been paid, it was not error to hold that evidence tending to show a mere loose agreement to insure with the agent, in a general way, was insufficient to raise a general contract of insurance.

Patterson vs. Ben Franklin Ins. Co., *Pa. S. C.*, 87 *Pa.*, 454 ; 5 *Ins. Law Jour.*, 376.

11. The burden of proving an oral contract to insure, is upon the claimant. Where the original contract was left to rest wholly on the recollections of the parties, and the entire transaction bore upon its face the evidence of a series of negotiations resulting in an understanding as to the terms upon which the claimant might insure, if he chose, and assurance by the agent that he would accept his terms, and no steps were taken to carry out this assurance until after the loss ; *Held*, that this was not a valid oral contract which the courts will enforce.

Continental Ins. Co. vs. Jenkins, *Ky. C. A.*, 5 *Ins. Law Jour.*, 514.

12. In an action upon a parol contract of insurance alleged to have been entered into by defendant through its agent, B., it appeared that B. was not in fact authorized to make contracts of insurance, but merely to receive and forward applications, deliver

policies sent to him, and collect premiums thereon; that when he took plaintiff's application, no money was paid, but the understanding was that the premium should be paid on the receipt and delivery of the policy; that B. then assured plaintiff that the insurance would take effect from the date of the application; that he was in fact authorized to make insurance to take effect from the time of the application, subject to the approval of the general agent, upon a certain class of property, but that the property here in question was not of that class; and that plaintiff's risk was not accepted by the general agent, but was rejected by him after the property was burned, but before he had knowledge of the fact. There was no evidence that defendant ever held B. out as clothed with authority to take risks for it, or that it knew that he was acting beyond his authority; and plaintiff knew that B. had no authority to issue the policy, but that it was to be issued by the general agent upon his approval of the application; and he took additional insurance in another company in consequence of the delay in receiving a policy from defendant, although B. assured him that his insurance with defendant was valid. *Held*, that there was no valid contract of insurance between the parties. Plaintiff had no right to rely upon the representations of the agent, which would not bind the company.

Ætna Ins. Co. vs. Maguire, 51 Ill., 342; distinguished.

Fleming vs. Hartford F. Ins. Co., Wis. S. C., 42 Wis., 616; 7 *Ins. Law Jour.*, 281.

13. The plaintiff stated to the agent that he wanted his policy renewed, and desired that it should be renewed before he left home; they agreed on the rate and the agent promised to attend to the matter; that he had the description of the property, and there was nothing more for plaintiff to do. The plaintiff then directed him to renew in the same company for the same amount as before, which the agent promised to do. *Held*, that the agreement was to effect an insurance in future, not a valid contract of insurance *in presenti*, and contained no waiver of the policy condition requiring prepayment of premium.

Taylor vs. Phœnix Ins. Co., Wis. S. C., 47 Wis., 365; 8 *Ins. Law Jour.*, 851.

GENERALLY.

14. In an action upon a parol contract, after a loss, between the company and the insured to pay a specified sum in liquidation of the claim, the agreement operates as a waiver of any limitation of time or breach of warranty in the policy, unless the contract was procured by fraud.

53 N. Y., 144.

Smith vs. Glens Falls Ins. Co., N. Y. C. A., 62 N. Y., 85 ; 4 Ins. Law Jour., 708.

15. Where it was claimed that the policy issued to a mortgagee for the insurance of his interest, contained a stipulation making it void in case any change should take place in the title which was not in conformity with the parol agreement of the agent from whom it was procured: *Held*, that a contract of insurance can be made by parol unless prohibited by statute or other positive regulation.

Sanborn vs. Ins. Co., 16 Gray, 448; Trustee vs. Ins. Co., 10 N. Y., 305; Ins. Co. vs. Shaw, 4 Otto, 574.

Held, that if a valid contract in the form set up in his count is proved, the plaintiff can recover at law the same damages as if he were suing on a policy issued in the form in which it was agreed to be issued.

Pratt vs. R. R. Co., 21 N. Y., 305; Tayloe vs. Ins. Co., 9 How., 390; Ins. Co. vs. Ins. Co., 19 ib., 318; Ellis vs. Ins. Co., 50 N. Y., 402.

Where the insured never saw or had possession of the policy until after the loss, it cannot be alleged that the parol contract was merged in the written policy. Where a contract of insurance is made with the mortgagor, the mortgagee cannot recover where the mortgagor has committed a breach of the conditions of the policy, but where the mortgagee is the party insured; the breach must be one committed by himself, not by the mortgagor, in order to work a forfeiture.

Grosvenor vs. Ins. Co., 17 N. Y., 391; Buffalo Works vs. Ins. Co., ib., 401; Carpenter vs. Ins. Co., 16 Pet., 495; Ins. Co. vs. Robert, 9 Wend., 404. Case excepted to of Tillou vs. Ins. Co., 1 Seld., 405.

Humphrey vs. Hartford F. Ins. Co., U.S. C. C. N. Y., 9 Ins. Law Jour., 265.

See Cross Index for other cases bearing on PAROL CONTRACT.

PARTIAL LOSS.

See ABANDONMENT, GENERAL AVERAGE, LOSS, MEASURE OF DAMAGES, PARTICULAR AVERAGE.

See Cross Index for cases bearing on PARTIAL LOSS.

PARTICULAR AVERAGE.

ABSTRACT OF THE LAW.

a. Particular average includes all losses from perils insured against under a marine policy, not embraced under general average, or which have not been voluntarily incurred for the benefit of other interests.

Wadsworth vs. Pacific Ins. Co., 4 Wend., 84; *Carter vs. Phoenix Ins. Co.*, 2 Wash. C. C., 51; *Rogers vs. Murray*, 3 Bos., 357.

b. Partial losses on a vessel, usually include whatever naturally appertains to the vessel as such, and which being in a sound condition at the commencement of the voyage, is subsequently injured by a peril insured against.

Hall vs. Ocean Ins. Co., 21 Pick., 472; *Depau vs. Ocean Ins. Co.*, 5 Cow., 63; *Richardson vs. Clark*, 15 Me., 421.

The general rule in case of repairs, is one-third off, new for old.

Wallace vs. Ohio Ins. Co., 4 Ohio, 234; *Firemen's Ins. Co. vs. Fitzhugh*, 4 B. Mon. (Ky.), 168.

c. Expenses for temporary repairs are generally a general average loss, if necessary to the completion of the voyage, and no deduction is to be made for old; but it is otherwise, if not necessary for the completion of the voyage.

Brooks vs. Oriental Ins. Co., 7 Pick., 259; *Plummer vs. Wildman*, 3 M. & S., 482.

d. Incidental expenses necessarily connected with repairs, or the preservation or sale of damaged goods, are usually included in the partial loss.

Muir vs. United Ins. Co., 1 Caines, 48; *Sewall vs. U. S. Ins. Co.*, 11 Pick., 90.

e. The value, whether of ship or goods, is usually that at the port and time of sailing.

2 Arnould on Ins., 983; *Coffin vs. Ins. Co.*, 9 Mass., 436; *Le Roy vs. Ins. Co.*, 7 Johns., 343.

See further on this subject under GENERAL AVERAGE.

See Cross Index for cases bearing on PARTICULAR AVERAGE.

PARTNER.

ABSTRACT OF THE LAW.

a. A partner or joint owner has an insurable interest in the whole property to the extent of his interest, and may insure to the full value for the benefit of the firm, if it appear that such was the intention, and his act is ratified by his copartners even after a loss; but in the absence of such intention and ratification, recovery is limited to his interest.

Finney vs. Ins. Co., 8 Met., 348; *Graves vs. Ins. Co.*, 2 Cranch., 419; *Manhattan Ins. Co. vs. Webster*, 60 Penn. St., 227; *Peoria &c. Ins. Co. vs. Hall*, 12 Mich., 202.

b. Whether a transfer of interest from one partner to another, or to a third party, will work a forfeiture, and when, the courts are not agreed. The question largely depends upon the precise language of the policy condition. Where the policy by its terms prohibits any change of interest or title, or of any undivided interest, a transfer between partners will forfeit; but ordinarily a change of interest has been held to relate only to transfers to third parties.

Hoffman vs. Aetna Ins. Co., 82 N. Y., 405; *Pierce vs. Ins. Co.*, 50 N. H., 297; *Niblo vs. Ins. Co.*, 1 Sandf. (N. Y.), 551; *Barnes vs. Ins. Co.*, 51 Me., 110; *Dix vs. Ins. Co.*, 23 Ill., 222; *Hartford F. Ins. Co. vs. Ross*, 23 Ind., 179; *Burnett vs. Ins. Co.*, 46 Ala., 11; *Finlay vs. Ins. Co.*, 31 Penn. St., 311.

c. But a dissolution of the partnership and division of the property, is a change of title.

Keeny vs. Home Ins. Co., 3 T. & C. (N. Y.), 478; *Dreher vs. Aetna Ins. Co.*, 18 Mo., 128.

See further on this subject under ALIENATION, INSURABLE INTEREST, TITLE.

See Cross Index for cases bearing on PARTNER.

PAYMENT.

ABSTRACT OF THE LAW.

a. The general principles controlling the validity of payments are in brief, that the party paying and the party receiving must have an express or implied authority, or their action must be subsequently ratified by their principal. The payment must usually be in money, unless there be an implied authority or sanction of usage which will authorize its acceptance in some other shape by the agent. Payment to one of two joint owners, trustees, or partners, will usually bind both. Payment of part where the sum is liqui-

dated, is not a satisfaction of the whole, unless made so by agreement, and received or sued for, as a full satisfaction. A receipt is not conclusive, and may be contradicted by parol. A check when accepted, is valid payment until dishonored, and there must be no laches on the part of the holder.

2 Chitty on Cont., 11 Am. Ed., 1095, *et seq.*

See as to the application of these principles to insurance contracts, under AGENT, BROKER, CONTRACT, POLICY, PAROL CONTRACT, PREMIUM, PREMIUM NOTE, REPLACEMENT, TITLE, WAIVER.

DIGEST OF RECENT CASES.

1. If a settlement is made by a member of a firm with an insurance company, for a loss occasioned to property of a firm, by a peril insured against, the firm cannot maintain an action on the policy, without first restoring or offering to restore what has been received under the settlement, although the partner who made the settlement was a minor, and the settlement was effected through the fraud of an agent of the company.

Brown vs. Hartford Fire Ins. Co., Mass. S. J. C., 117 Mass., 479.

2. The burden of proof that a loss has been paid, is on the company, and a judgment by default will not be disturbed because there was no proof that it had not been paid.

Clay F. & M. Ins. Co. vs. Wusterhausen, Ill. S. C., 5 Ins. Law Jour., 180.

See Cross Index for other cases bearing on PAYMENT.

PERILS OF THE SEA.

ABSTRACT OF THE LAW.

a. Perils of the sea embrace all loss or damage arising from the extraordinary action of the wind and sea, and such unavoidable accidents as are directly connected with navigation.

1 Parsons on Marine Insurance, 544, and cases cited.

b. Stranding is a peril of the sea when not occurring in the usual course of navigation.

Firemen's Ins. Co. vs. Howell, 13 B. Mon., 311; Thompson vs. Whitmore, 3 Taunt., 227.

c. Collision, when proximately due to the operation of the elements, is a peril of the sea, though aided by the negligence or unskillfulness of the master or crew.

Ocean Mutual Ins. Co. vs. Sherwood, 14 Ohio, 351; *Nelson vs. Suffolk Ins. Co.*, 8 Cush., 477.

See further on this subject under COLLISION, NEGLIGENCE, STRANDING.

DIGEST OF RECENT CASES.

1. Where the jury were told that the vessel must be in a fit state of repair and equipment to encounter the ordinary perils of the sea, and that it was upon the plaintiff to show this by more than mere *prima facie* evidence, and their attention was called to the conflicting evidence regarding one of the pumps, this was sufficient compliance with a request to charge that if it was out of repair and useless from the time of commencing the voyage, that was unseaworthiness.

Sturm vs. Atlantic Mut. Ins. Co., N. Y. C. A., 63 N. Y., 78; 5 *Ins. Law Jour.*, 209.

See Cross Index for other cases bearing on PERILS OF THE SEA.

PETROLEUM.

See KEEPING AND STORING, PROHIBITED RISKS.

See Cross Index for cases bearing on PETROLEUM.

PLACE OF CONTRACT.

See LEX LOCI.

PLEADING.

DIGEST OF RECENT CASES.

1. The statute entitled "Betting and Gaming," N. Y. 1 Rev. St., 661, renders unlawful and void all wagers and stakes and contracts based on any unknown or contingent event, but provides that it shall not be extended to include insurance made in good faith for the security or indemnity of the insured, and not otherwise prohibited by law. *Held*, that there is authority for saying that an averment of interest is necessary in declaring on a marine policy in order to bring it within the exception, and renders it questionable whether decisions previous to the act taking effect, that no such averment was necessary in declaring on a marine policy, can be considered as binding authority.

Williams vs. Ins. Co. of North America, How. Pr. Rep., 365; Ruse vs. Mutual Benefit Life Ins. Co., 23 N. Y., 516.

The complaint alleges the business of the insured, and states the conditions of said policy as to the interest of the insured, and substantially the terms of the insurance, the subject insured, and the "proper indorsement."

Held, that the allegation of such proper indorsement having been duly made, in connection with the terms of the policy, is a sufficient averment of some interest, and if regarded as too indefinite, application should have been made to make it more definite. The subsequent allegations of damage and its discovery, of information to defendant, of defendant's instructions to ascertain its amount, and subsequent demand for and reception of a premium, and of the proceeds of the sale and estimated damages, amount to an averment of the plaintiff's entire interest and of the defendant's recognition of such interest. The complaint states that the loss was caused by collision before the policy attached, but that the boat and cargo were in good condition at that time; also that no substantial injury appeared to have been done at the time of the collision, and none was discovered until the discharge of the cargo commenced. *Held*, that there was no vio-

lation of the implied warranty of seaworthiness, or any affirmation that the injury was in active operation when the policy attached. The policy is not set forth in the complaint, and the only reference to a condition that a statement of the damages must be rendered within thirty days, is an allegation setting forth the facts that prevented a compliance. *Held*, that it would not be proper on demurrer to decide that such a condition involving entire forfeiture, had not been complied with. Such a penalty should only be declared on affirmative evidence of non-compliance.

Young vs. Phenix Ins. Co., N. Y. Com. A., 4 Ins. Law Jour., 219.

2. In an action on a policy which provides that proof of loss must be made within thirty days, the petition which does not allege such performance specifically, but which affirmatively alleges facts which show that more than thirty days had elapsed, is bad on demurrer.

Home Ins. Co. vs. Lindsey, Ohio S. C., 5 Ins. Law Jour., 549.

3. Application for a change of venue on account of local prejudice was refused. *Held*, that the granting of a change of venue is not discretionary in Illinois, and it was error calling for a reversal of judgment to refuse it.

Barrows vs. People, 11 Ill., 121; Commercial Ins. Co. vs. Mehlman, 48 Ill., 316.

An averment in the declaration that appellees were interested in the property to the value of \$5,000, made under a videlicet, is good on general demurrer or in arrest of judgment, against an objection that the value of the property destroyed has not been averred, though it might be bad on special demurrer. The policy insured the property against loss by fire and permitted other insurance. A subsequent clause provided that insured should not recover any greater proportion of loss than the amount insured bore to the whole sum insured. *Held*, that it was not necessary to aver in the declaration to what extent the property was insured in other companies.

1 Chit. Pl., 256.

Knickerbocker Ins. Co. vs. Tolman, Ill. S. C., 5 Ins. Law Jour., 786.

4. A policy condition requiring notice forthwith, and within thirty days a particular account of the loss, stating what other insurances existed, copies of the written portion of all policies, the cash value at the time of loss, and the interest of the insured; also, a certificate of a magistrate or notary public, etc., is not complied with by a mere appraisal, accompanied by a certificate of a notary public. Such preliminary proofs are conditions precedent to the right of recovery.

Blakely vs. Phoenix Ins. Co., 30 Wis., 217; *Inman vs. Western Ins. Co.*, 12 Wend., 452; *Owens vs. Farmers' Joint Stock Co.*, 47 Barb., 513; *Welcome vs. People's Ins. Co.*, 2 Gray, 480.

Where the policy provides the loss shall not be payable until the certificate of a magistrate as to certain facts is produced, the production of such certificate is a condition precedent to the plaintiff's right to sue.

Johnson vs. Phoenix Ins. Co., 112 Mass., 49.

An averment of the performance of the conditions is therefore necessary in the petition, and the proof must sustain the averment.

Flanders on Ins., 514; *St. Louis Ins. Co. vs. Kyle*, 11 Mo., 185.

Held, that until such averment is made, no evidence of loss can be introduced, and therefore proof of a waiver of such conditions is not admissible.

Lambert vs. Palmer, 29 Iowa, 104; *Woolsey vs. Williams*, 24 Iowa, 413.

Where the petition was thus substantially defective, the defendant was entitled, under the Iowa Code, to move in arrest of judgment.

Nollen vs. Wisner, 11 Iowa, 190; Code, sec. 2650.

Edgerly vs. Farmers' Ins. Co., *Iowa S. C.*, 5 *Ins. Law Jour.*, 846.

5. Appellant pleaded "that a change took place in the title of the property insured, by voluntary transfer." *Held*, on demurrer, that the law does not affix such a definite meaning to these words that there can be no question as to the steps by which the transfer was effected, or the character of the title vested. They are merely the expression of a conclusion involving questions of both law and fact, and therefore incapable of furnishing an issue to the jury. The plea was defective. Nor does it aid the case that the

plea was in response to an allegation of the insured similar in its terms, for the allegation was a surplusage, and non-essential; the clause was for the benefit of the appellant, on whom it was incumbent to interpose a breach of it, if desired as a defense.

Stevens on Pleading (9th Am. ed.), 349; *Comyn's Digest*, tit. *Pleading*, c. 57; 1 *Chitty on Pl.* (7 Am. ed.), 573.

Where two replications were filed to one plea without consent of court, but afterward consent was given to reply double, but the two pleas were not withdrawn and refiled, and upon failure of appellant to rejoin as ordered, judgment was given by default; *Held*, that this was not error.

Clay F. & M. Ins. Co. vs. Wusterhausen, Ill. S. C., 5 *Ins. Law Jour.*, 180.

6. In American pleadings, it is not necessary to specifically allege waiver in the pleadings in order to prove it on trial, though it is still required in English courts. The company defendant filed a special plea alleging non-performance of a policy condition requiring notice of other insurance. *Held*, that a permission to the plaintiff to file three special replications alleging facts that would constitute a waiver was not error.

Levy vs. Peabody Ins. Co., W. Va. S. C. A., 10 *W. Va.*, 560; 6 *Ins. Law Jour.*, 769.

7. Where a general allegation in the declaration is sufficient to support proof of waiver, however it might occur, and the defendant goes to trial upon a declaration embracing terms technically objectionable, or too broad for accurate pleading, without a demurrer, he cannot complain on appeal that the evidence showed a variance in the manner of the waiver.

State Ins. Co. vs. Todd, Pa. S. C., 83 *Pa.*, 212; 6 *Ins. Law Jour.*, 893.

8. The appearance, by a corporation, in a plea to the jurisdiction of the court, should not be in person or by attorney, but may be by its president.

Cases of *Osburn vs. U. S. Bank*, 8 *Wheat*, 829, 830; *Chitty's Pleadings*, vol. 1 (7th Eng., 16th Amer. ed.), pp. 777-8, p. 444; *Bacon's Abridg.*, vol 1, p. 2; *Robinson's Pr.*, vol. 5, pp. 23, distinguished. 2 *Sanders' Rep.*, 21; *Horton & Horton vs. Townes*, 6 *Leigh.*, 58; *Guild vs. Richardson*, 6 *Pick.*, 371; 1 *Chitty*, 444; *Mockey vs. Gray*, 2 *Johns.*, 192; 6 *Daua*, 108.

The proper conclusion of such a plea is whether the court can or will take further cognizance of the action, and not the action abate and be dismissed.

Chitty on P., vol. 1, p. 461; Rob. Pr., vol. 5, p. 23; Horton vs. Townes, 6 Leigh., 58.

The averments in such a plea, as in all other pleas, of all the material facts, should be direct and positive, and not by way of recital. The affidavit to the facts stated in such a plea should be positive, and not as the plaintiff believes.

Jackson vs. Webster, 6 Mum., 462, distinguished.

The averments in such a plea of the location of the principal office of the corporation and of its president's residence, should be as of the time the action was brought.

Rob. Pr., pp. 23-24.

Such a plea must be certain to every intent, and all the old strictness of the common law, both as to their form and substance, is still required, and a failure of such a plea in any of the particulars above indicated would be fatal, and such defective plea should, on motion of the plaintiff, be stricken from the record.

Horton & Horton vs. Townes, 6 Leigh., 58; May vs. State Bank of N. C., 2 Rob. R., 60.

In an action of assumpsit on a policy of insurance, it is necessary for the plaintiff to allege an interest in the property insured, which is insufficiently done by the allegation that the defendant insured the plaintiff's property.

Cases considered and discussed of Nantes vs. Thompson, 2 East., 385; Crawford et al. vs. Hunter, 8 T. R., 14; Rhind vs. Wilkeson, 2 Taunton, 238; Cousins vs. Nantes, 3 ib., 513; Page vs. Fry, 2 Bos. & Pul., 240; Cohen vs. Wannot, 5 Taunton, 101; 1 Eng. Com. L. R., 26; Powles and others vs. Janes, 11 M. & W. R., 10; 2 Rob. Practice, 302; May on Ins., §§ 2, 7, 117, 587; 3 Kent, 371; 2 Greenleaf on Ev., § 404; Flanders on Fire Ins., 17, 376; Rising Sun Ins. Co. vs. Slaughter et al., 20 Indiana Reports, 526; Fowler vs. New York Indemnity Ins. Co., 23 Barbour, 143; 26 N. Y. R., 422; Freeman vs. Fulton F. Ins. Co., 38 Barb., 258; Burr vs. Mutual Benefit Life Ins. Co., 23 N. Y., 516; Howard vs. Albany Ins. Co., 3 Denio, 310; Murdock vs. Chenango County Mutual Ins. Co., 2 Comst., 210; Peabody vs. Washington County Mutual Ins. Co., 20 Barb., 340; Granger vs. Howard Ins. Co., 5 Wend., 202; Lane vs. Maine Mutual Fire Ins. Co., 12 Maine R., 44.

Such a declaration having alleged that the loss was to be paid in 60 days after proof and notice, given the defendant in the manner required by the policy, it is necessary for the declaration to

allege this manner, and that such proof and notice were accordingly given, and a failure to make the allegations or the allegation of interest, is fatal to the declaration on general demurrer.

Simmons vs. Ins. Co., 8 W. Va., 474.

In an action of assumpsit, based on the adjustment of the loss incurred by the fire, it is necessary to allege that the adjustment was made with the defendant, and this is insufficiently done by an allegation that it, the adjustment, was made with an agent of the defendant, and it is also necessary to allege that the defendant promised to pay the amount of such adjustment, and a failure to make such allegations is fatal to the declaration on general demurrer.

Mills vs. Pacific R. R. Co., 35 Mo., 164; *Winston's Ex'or vs. Francisco*, 2 Wash., 187; *Sexton vs. Homes*, 3 Munf., 556; *Cooke vs. Simms*, 2 Coll., 47; *Moody vs. Hannoy*, 6 Munf., 506; *Mingo vs. Brown*, 12 Rich., (§ 6,) 279; *Muldrows vs. Tappan*, 6 Mo., 276; *McNulty vs. Collins*, 7 Mo., 69; *Gideon, Burton & Co. vs. Lee and Handsford*, Va. S. C.

Quarrier vs. Ins. Co., W. Va. S. C., 10 W. Va., 507; 6 *Ins. Law Jour.*, 741.

9. Where the court was asked in a new case to reconsider its construction of the contract entered into between a premium note company and its members, under five-year policies, on the ground that all the facts had not been before it, the record should be sufficiently complete to show the contract itself, not merely the counsel's version of some of its stipulations. It is not always easy or safe to attempt to confine the court to such questions as counsel may stipulate.

American Ins. Co. vs. Reed, Mich. S. C., 40 Mich., 622; 8 *Ins. Law Jour.*, 437.

10. Where there is nothing in the terms of a policy of insurance which requires the truth of the representations in the application therefor to be averred as precedent to a right of action on the policy, a good cause of action may be made in a petition founded on the policy, without setting forth the application and averring the truth of the representations therein; but the falsity of such representations, where they are such as to invalidate the policy, may be set up by way of defense.

Guardian M. L. Ins. Co. vs. Hogan, 80 Ill., 35; Troy Fire Ins. Co. vs. Carpenter, 4 Wis., 20; Herron vs. Peoria M. & F. Ins. Co., 29 Ill., 235; Lounsbury vs. Protection Ins. Co., 8 Conn., 459.

Where it is provided in a fire policy that the insurer, in lieu of paying for a loss in money, may rebuild or replace the property destroyed, such provision is in the nature of a condition subsequent, available only at the option of the insurer; it is therefore unnecessary to aver in the petition, in an action on the policy for the amount of the loss, that the insurer refuses to rebuild or replace the property destroyed.

Howard F. & M. Ins. Co. vs. Cormick, 24 Ill., 455.

Where a policy requires notice of a loss to be given to the insurer immediately after the fire, such notice is a condition precedent to a right of action on the policy; but in such action, under the provisions of section 121 of the Code, it is a sufficient averment of the performance of a condition, for the plaintiff to state in his petition that he has performed all the conditions on his part to be performed. Although a demurrer to a petition for want of a material fact is erroneously overruled, if the fact is properly put in issue by the subsequent pleadings, and the case is tried thereon, the judgment cannot be reversed for error in overruling the demurrer. The correctness of a verdict of a jury, or finding of facts on the evidence, is not necessarily brought in review by a general assignment of error, that the judgment was rendered for the wrong party; to require such a review, the overruling of the proper motion for a new trial must be assigned as error.

Davis vs. Hines, 6 Ohio St., 743; Dayton Ins. Co. vs. Kelly, 24 Ohio St., 345.

A general assignment of error that the judgment was rendered for the wrong party, strictly raises only the question whether the proper judgment has been rendered upon the pleadings and findings of fact; but where all the evidence is properly embodied in the record, it necessarily raises the question of law as to whether there is any evidence tending to sustain the finding of facts; if there be such evidence, and the proper judgment has been rendered on the pleadings and facts found, where there is no other assignment of error, an affirmance of the judgment of the District Court is not erroneous.

Adams vs. The State, 25 Ohio St., 584; Levi vs. Daniels, 22 Ohio St., 38; Davis vs. Hines, 6 Ohio St., 473; Turner vs. Turner, 17 Ohio St., 449.

Union Ins. Co. vs. McGookey & Moore, O. S. C. C., 33 O., 555; 8 Ins. Law Jour., 417.

See Cross Index for other cases bearing on PLEADING.

POLICY.

ABSTRACT OF THE LAW.

a. An open policy is one in which the liability is not fixed in the case of loss, but is left to be determined by the evidence. A valued policy is one in which the liability of the underwriter is fixed by agreement as to the value, and is not usually open to evidence to vary the amount.

Lycoming Ins. Co. vs. Mitchell, 12 Wr., 372; Ins. Co. of N. A. vs. McDowell, 50 Ill., 120; Phoenix Ins. Co. vs. McLean, 100 Mass., 473.

b. In the case of fraud, however, a valuation is not conclusive.

Hersey vs. Merrimac County Mutual F. Ins. Co., 7 N. H., 149.

c. In case of doubt, the intention of the parties must determine whether or not the policy be valued.

Cox vs. Aetna Ins. Co., 29 Md., 58.

d. In the construction of policies, the intention of the parties must be sought and effectuated if possible, and the general scope of the whole instrument must be looked to for this purpose.

Goss vs. Citizens' Ins. Co., 11 La. An., 47.

e. In case of repugnancy, the written must prevail over the printed portion, and in case of doubt the language must be construed in the sense most favorable to the insured, and to give the largest indemnity.

Aetna Ins. Co. vs. Jackson, 16 B. Mon. (Ky.), 242; Wilson vs. Hampden F. Ins. Co., 4 R. I., 156; Benedict vs. Ocean Ins. Co., 31 N. Y., 389; Reynolds vs. Com. F. Ins. Co., 47 N. Y., 597; Leeds vs. Mechanics' Ins. Co., 8 N. Y., 351.

f. The term house, or building, in the policy includes everything pertinent and essential to the main building, such as detached kitchen, privies, etc.

Blake vs. Exchange Mutual Ins. Co., 12 Gray, 265; Washington Mut. Ins. Co. vs. Merchants and Manufacturers' Ins. Co., 5 Ohio St., 450.

g. Terms when manifestly used in a generic sense, to include a congeries of separate structures or risks, will be so construed; thus a factory may consist of several buildings, and stock in trade may cover whatever is necessary to the business.

Peoria M. & F. Ins. Co. vs. Lewis, 18 Ill., 562; Moadinger vs. Mechanics' F. Ins. Co., 2 Hall, 490; Bigler vs. N. Y. Central Ins. Co., 20 Barb. (N. Y.), 635.

h. But the policy will not be so extended by implication to a congeries of risks, when the apparent intention of the parties will restrict it to a single building or risk.

Liebenstein vs. Aetna Ins. Co., 45 Ill., 303; *Moadinger vs. Mechanics' F. Ins. Co.*, *supra*.

i. Only such things as by necessary implication belong to the subject matter, are included; insurance on buildings does not include materials which are not at the time part of the building.

Ellmaker vs. Franklin Ins. Co., 5 Penn. St., 183.

j. Machinery usually includes all such mechanical devices and instruments connected therewith for the modification of force, as are not included in the idea of tools and utensils; but whatever is designed for strictly manual use, and is capable of being handled and manipulated by a single man, is usually a tool or utensil.

Lovewell et al vs. Westchester Ins. Co., 10 Pick. (Mass.), 423; *Buchanan vs. Exchange F. Ins. Co.*, 61 N. Y., 26; *Seavey et al. vs. Cent. Mutual F. Ins. Co.*, 111 Mass., 540.

k. Household goods and furniture include whatever chattels are intended for the convenience, comfort, or ornament of a household; but do not include fixtures, nor articles for personal use or adornment, such as clothing and jewelry, nor articles not designed for permanent use in the household, such as provisions or fuel.

Clark vs. Firemen's Ins. Co., 18 La., 431; *Clarey vs. Protection Ins. Co.*, Wright, 227; *Holmes vs. Charlestown Mutual Ins. Co.*, 10 Met. (Mass.), 211.

l. Goods and merchandise include whatever is part of the stock in trade, but not articles intended simply for consumption, and embrace whatever stock may be on hand at the time of loss, irrespective of its existence at the time of contracting.

Kent vs. London Ins. Co., 28 Ind., 294; *Hooper vs. Hudson River Ins. Co.*, 17 N. Y., 424; *Mills vs. Farmers' Ins. Co.*, 37 Iowa, 400; *Peoria Ins. Co. vs. Lewis*, 18 Ill., 553; *Franklin F. Ins. Co. vs. Updegraff, Wr.*, 350.

m. But a specific designation of the goods or merchandise excludes whatever does not belong to the class designated.

Hanover F. Ins. Co. vs. Mannasson, 29 Mich., 813.

n. A policy on a factory or a manufacturing risk, usually includes whatever in the way of machinery, tools, and fixtures, is essential to the conduct of the business.

Collins vs. Charlestown Mutual Ins. Co., 10 Gray, 155; *Home Ins. Co. vs. Favorite*, 46 Ill., 263; *Aurora F. Ins. Co. vs. Eddy*, 55 Ill., 213.

o. Prohibited risks, mentioned in the policy, do not usually apply to such risks as are necessary, or incidental to the particular business or the manufacture.

Bryant vs. Poughkeepsie Ins. Co., 17 N. Y., 200; *Harper vs. N. Y. Ins. Co.*, 23 N. Y., 441; *Washington Mutual Ins. Co. vs. Ins. Co.*, 5 Ohio St., 450; *Brown vs. Kings County F. Ins. Co.*, 31 How. Pr., 508.

p. But an express prohibition against the keeping of certain articles, will not always be invalidated by the fact that such articles were part of the customary stock in trade.

Lee vs. Howard Ins. Co., 3 Gray (Mass.), 592; *Whitehall vs. City F. Ins. Co.*, 16 Gray (Mass.), 276; *Pindar vs. Ins. Co.*, 47 N. Y., 114.

q. Where the prohibition is manifestly intended against one specific manner of use or storage, it will not by implication be extended to others, though within the letter of the prohibition; thus the use of burning fluids for lighting is not within the prohibition of the storage of such fluids.

Buchanan vs. Exchange F. Ins. Co., 61 N. Y., 26; *Moore vs. Protection Ins. Co.*, 29 Me., 97; *Mayor of New York vs. Hamilton Ins. Co.*, 10 Bos., 527; *Grant vs. Howard Ins. Co.*, 5 Hill, 10.

r. The policy covers only such subject matter as is contained in the place designated at the time of loss.

Boynton vs. Clinton Ins. Co., 19 Barb., 254; *Eddy Street Foundry vs. Camden etc. Ins. Co.*, 1 Cliff (U. S.), 300; *Lycoming Ins. Co. vs. Updegraff*, 40 Penn. St., 311.

s. But where the character of the property justifies its temporary removal as an incident of its use, such removal will be regarded as within the intentment of the parties.

McClure vs. Girard F. and M. Ins. Co., 48 Iowa, 349.

t. A removal which is still within the general description of the location, will not avoid the policy.

Boynton vs. Clinton Ins. Co., 16 Barb. (N. Y.), 254; *West vs. Old Colony Ins. Co.*, 9 Allen (Mass.), 316; *Storer vs. Elliott Ins. Co.*, 45 Me., 175.

u. Loss or damage resulting from water, or from removal, and theft during such removal, in the face of a conflagration, are within the policy when the danger was sufficiently imminent to justify the removal, unless the insured failed to exercise reasonable care. The question is whether the fire can be charged as the proximate cause of loss, which must be determined from the special circumstances of the case.

White vs. Republic Fire Ins. Co., 57 Me., 91; *Case vs. Hartford Ins. Co.*, 13 Ill., 676; *Hillier vs. Alleghany Ins. Co.*, 3 Penn., 470; *Indep. Ins. Co. vs. Agnew*, 84 Penn. St., 96; *Witthell vs. Ins. Co.*, 49 Me., 200.

v. But a stipulation exempting or limiting the liability in such case, is valid and will be enforced.

L. L. & G. Co. vs. Creighton, 51 Ga., 95; *Webb vs. Prot. Ins. Co.*, 17 La. An., 131.

w. Where the classification of risks as printed, is inconsistent with the written language, or ambiguous, the latter will prevail and will be liberally construed, as where permission for other extra-hazardous purposes is granted, it will cover risks also classified as specially hazardous, if of the same general character as the subject of insurance, but not if their character is different, though the class be the same as that of the subject matter.

Reynolds vs. Conn. F. Ins. Co., 47 N. Y., 597; *Lee vs. Howard F. Ins. Co.*, 3 Gray (Mass.), 592.

x. Where the stock or use is by a written stipulation, restricted to a certain class of hazards, the addition of a greater hazard, though usual in the business, will work a forfeiture; but the limitation must be clear and unequivocal, and will be strictly construed.

Macomber vs. Howard F. Ins. Co., 1 Gray (Mass.), 237; *Steamboat vs. Relief Ins. Co.*, 13 Wall. (U. S.), 183; *Westfall vs. Hudson River F. Ins. Co.*, 2 Kern. (N. Y.), 289.

y. Where the subject of insurance is specially designated, the policy will not by implication be extended to cover other property of the same general class. A stock in trade "consisting of" certain articles, covers only such articles, though they may be but part of the stock; but the specifying of

certain articles, as *included* in the general subject of insurance, does not operate as a limitation.

Medina vs. Builders' Ins. Co., 120 Mass., 225; *Rafel vs. Nashville Ins. Co.*, 7 La. An., 244; *Crosby vs. Franklin Ins. Co.*, 5 Gray (Mass.), 504; *Webb vs. Nat. F. Ins. Co.*, 2 Sandf. (N. Y.), 497.

z. Insurance in the name of a party generally will cover whatever interest he may have, but if the specific interest be also designated, the authorities are not agreed whether it will be extended further.

Columbian Ins. Co. vs. Lawrence, 2 Pet., 25; *Murray vs. Columbian Ins. Co.*, 11 Johns., 302; *Toppan vs. Atkinson*, 2 Mass., 365; *Conway vs. Gray*, 10 East., 536.

aa. Under an open or running policy in marine insurance, the indorsement, if made by the insured, must usually be notified to the insurer, but the courts are not agreed as to what will bind the insurer. Where the indorsement plainly includes a part of the subject originally contemplated in the contract, the general doctrine appears to be that the insurer cannot reject it at his option. Notification however is not necessary in such case unless required by the contract, nor is its acceptance by the insurer necessary to bind him unless required.

Kennebec Co. vs. Augusta Ins. & Bank. Co., 6 Gray, 204; *Donnville vs. Ins. Co.*, 12 La. An., 259; *Protection Ins. Co. vs. Wilson*, 6 Ohio St., 553; *E. Carver Co. vs. Ins. Co.*, 6 Gray, 214.

bb. Whether an indorsement made with due diligence after a loss is valid, the courts are not agreed.

E. Carver Co. vs. Ins. Co. *supra*; *Edwards vs. Ins. Co.*, 7 Mo., 382; *Gledstones et al. vs. Roy. Ex. Ass.*, 11 L. T., 305.

cc. The mere specification of value, will not convert an open into a valued policy, where either through repugnant conditions, such as a limitation to the amount necessary to replace, the actual value is made the basis of indemnity, or where in case of partial loss, there is no apparent means of determining the amount of indemnity apart from the actual damage. But where the part lost is one of a specified number of valued articles of equal worth, the damage is that proportion of the valued sum.

Brown vs. Quincy Mut. F. Ins. Co., 105 Mass., 396; *Cushman vs. N. W. Ins. Co.*, 34 Me., 487; *Harris vs. Eagle Ins. Co.*, 5 Johns., 368.

dd. Valuation will not protect a mere wager policy, nor is it conclusive in case of fraud, but in the absence of fraud, a valid insurable interest will usually support the policy, and no proof of value be required.

Robinson vs. Ins. Co., 1 Met., 143; *Alsop vs. Comm. Ins. Co.*, 1 Sumner, 451; *Hodgson vs. Ins. Co.*, 6 Cranch, 206; *Catron vs. Tenn. Ins. Co.*, 6 Humph., 176.

ee. A policy may be open as to part and valued as to part. As to the effect of open and valued policies on each other the courts are not agreed, the intention of the insured is usually looked to.

McKim vs. Ins. Co., 2 Wash. C. C., 89; *Murray vs. Ins. Co.*, 2 Wash. C. C., 186; *Riley vs. Ins. Co.*, 2 Conn., 268.

ff. The intention of the party effecting the insurance, usually determines who is to be the beneficiary; insurance for whom it may concern, covers the interest of those who may be owners at time of loss, but where a specific party is designated, the interest must have subsisted at time of insuring and the

benefit will be confined to such party. Such insurances must be either by authority express or implied however, or be subsequently ratified.

Buck vs. Chesapeake Ins. Co., 1 Pet., 151; *Holmes vs. Ins. Co.*, 2 Johns. Cas., 329; *Protection Ins. Co. vs. Wilson*, 6 Ohio St., 553; *Russell vs. N. E. Ins. Co.*, 4 Mass., 82.

gg. The policy is binding on the insured as respects payment of premium, from the inception of the risk.

Patapsco Ins. Co. vs. Smith, 6 Harris & J., 166; *Taylor vs. Lowell*, 3 Mass., 331.

hh. A policy insuring one party or interest only, cannot be claimed as covering others, but where the language implies that other interests or parties were contemplated, as in insurances "for whom it may concern," as "agent," etc., such interests or parties may be proved.

Foster vs. Ins. Co., 11 Pick., 85; *Holmes vs. Ins. Co.*, 2 Johns. Cas., 329; *Protection Ins. Co. vs. Wilson*, 6 Ohio St., 553; *Duncan vs. Sun Ins. Co.*, 12 La. An., 486.

ii. The acceptance of premium for a renewal will be a waiver of forfeiture, or an estoppel, in respect to facts which are then actually or presumptively within the knowledge of the insurer, such as other insurance not indorsed, or interest of the insured, and if the premium be accepted knowingly from a new party in interest, it is a recognition of his interest, and a new contract with him.

Carroll vs. Charter Oak Ins. Co., *supra*; *Phelps vs. Gebhard Ins. Co.*, 9 Bosw. (N. Y.), 405; *N. E. Ins. Co. vs. Wetmore*, *supra*; *Peoria M. & F. Ins. Co. vs. Hervey*, 34 Ill., 46.

jj. Where the policy has been partially exhausted by a loss, it remains a valid contract, and is liable in case of further loss, only for the unexhausted portion.

Trull vs. Roxbury Ins. Co., 3 Cush. (Mass.), 263; *Curry vs. Ins. Co.*, 10 Pick. (Mass.), 535; *Crombie vs. Portsmouth Mut. Ins. Co.*, 6 Fost. (N. H.), 389.

kk. A renewal is for most purposes regarded simply as an extension or continuation of the original, and not a new contract, even though procured by an assignee; but it has also been declared a new contract on the same basis as the old. The basis and all the terms of the original policy continue in force unless otherwise specified, and a ground of forfeiture under the original policy will equally apply to the renewal, unless waived by knowledge or acts of insurer. But when such change is specified in the renewal, it will be controlling, and override anything in the original contract which is inconsistent. Any change in the law relating to the contract, prior to renewal, becomes a part thereof.

Wetherell vs. Ins. Co., 49 Me., 200; *N. E., etc., Ins. Co. vs. Wetmore*, 32 Ill., 221; *Brady vs. Ins. Co.*, 11 Mich., 425; *Healey vs. Imperial Ins. Co.*, 5 Nev., 268; *Carroll vs. Charter Oak Ins. Co.*, 38 Barb. (N. Y.), 402; *Eddy St. Foundry vs. Farm. Mut. F. Ins. Co.*, 5 R. L., 426; *Post vs. Aetna Ins. Co.*, 43 Barb. (N. Y.), 351; *Driggs vs. Albany Ins. Co.*, 10 Barb. (N. Y.), 440.

DIGEST OF RECENT CASES.

POLICY—CONSTRUCTION OF.

1. A schedule referred to in the policy, had after each article named, a sum indicated thus: portrait of, &c., \$1,000. *Held*, that this was not a valued policy, where it was further stipulated

that the loss should be estimated according to the actual cash value.

Luce vs. Springfield F. & M. Ins. Co., U. S. C. C. Mich., 2 Ins. Law Jour., 443.

2. The value of the property was stated in the policy to be \$3,500, and the certificate of the magistrate affixed the same value. *Held*, that the latter was only an *ex parte* opinion, and the policy was not valued.

Ætna Ins. Co. vs. Farrell, Tenn. S. C., 3 Ins. Law Jour., 852.

3. A policy on presses, described as located, etc., is specific, and not floating so as to include presses subsequently purchased.

Mauger vs. Holyoke Mutual F. Ins. Co., U. S. C. C. Mass., 3 Ins. Law Jour., 55.

4. The policy required the certificate of the nearest magistrate not "concerned in the loss." The insured was suspected of incendiarism, and if guilty would have been liable to the nearest magistrate for damages, resulting from the fire having been communicated to adjoining property owned by him. *Held*, that as the granting of such a certificate would have been almost conclusive against his right of recovery in an action against the insured, the magistrate was "concerned in the loss," within the meaning of the policy. The object of the phrase was to obtain an impartial and indifferent arbiter between the parties.

Wright vs. Hartford Fire Ins. Co., Wis. S. C., 36 Wis., 522; 4 Ins. Law Jour., 251.

5. The application was filled in blank by the agent from the representations of the insured. The policy was upon wool, covering the interest of P. only. Subsequently the agent, on the representation of P. that he had forgotten to mention that his son had an undivided interest in the wool, inserted the clause in the policy, "in case of loss, if any, one half payable to G. as his interest may appear." *Held*, that parol evidence is admissible to show the nature of G.'s interest, and the intent of the parties to have that interest insured.

Clinton vs. Hope Ins. Co., 45 N. Y., 454; Aff. S. C., 51 Barb., 647; Bidwell vs. Northwestern Co., 19 N. Y., 182; Arnold on Ins., note 25; 1 Phil. on Ins., 163; Colpoys vs. Colpoys, 6 Jacob, 451; Burrows vs. Turner, 24 Wend., 277; Newson vs. Douglas, 7 H. & John., 417; Turner vs. Burrows, 5 Wend., 541; Mussey vs. Atlas Mut. Ins. Co., 14 N. Y., 79; case of Grosvenor vs. Atlantic Fire Ins. Co., 17 N. Y., 391, distinguished.

Testimony showed the son's interest as tenant in common. The agent had sufficient authority for making the alteration. *Held*, that the clause may be regarded as a new contract with the real party in interest, for which there was sufficient consideration in the otherwise equitable right of P. to a proportionate return of premium, and P. was entitled to recover for the whole amount as assignee of G.

Solmes vs. Rutgers Fire Ins. Co., 40 N. Y., 416.

Questions as to the meaning of particular words used in a special sense in a written instrument, are questions of construction for the jury. If it be assumed that the contract to insure the interest of G. was made not with himself, but with P., in his behalf, P. still has a right to recover, as trustee, under § 113 of the Code.

Considerant vs. Brisbane, 22 N. Y., 389; Sargent vs. Morris, 3 Barn. & Ald., 280; Some vs. Equitable Ins. Co., 12 Gray, 532; Williams vs. Ocean Ins. Co., 2 Metc., 306; 2 Phillips on Ins., 1958.

Pitney vs. Glens Falls Ins. Co., N. Y. C. A., 65 N. Y., 6; 4 Ins. Law Jour., 765.

6. *Held*, that all limitations of the contract of insurance by provisos and exceptions, should be made in clear and unmistakable terms, so as not to mislead the insured, who has a right to expect a construction favorable to himself where the terms will rationally permit it. Where the words of a proviso are capable of more than one construction, that one should be adopted which is most strongly against the party whose language is to be interpreted, and all exceptions should clearly withdraw the case from the general and positive agreement in order to be binding.

Boon vs. Aetna Insurance Co., U. S. C. C., 4 Ins. Law Jour., 27.

7. The word machinery, in a policy on the machinery of a

paper-mill, covers all the tools and implements used therewith in the manufacture of paper.

Buchanan vs. Exchange Fire Ins. Co., N. Y. Com. A., 4 Ins. Law Jour., 458.

8. The policy, with the usual mortgagee clause, payable to mortgagee, provided that if the property was misdescribed by insured so as to be charged a lower rate it should be void; or if the risk should be increased by any means within the control of the insured, without notice, it should be void; or if the risk should be increased "by the erection of buildings, or by the use or occupation of neighboring premises, or otherwise; or if for any other cause the company shall so elect, it shall be optional with the company to terminate the insurance after notice given to the insured or his representatives." *Held*, that these were four distinct and independent conditions. *Held*, that the clause authorizing its termination at the election of the company was not to be interpreted by the rule *noscitur a sociis*; that the cause need not have relation to an increase of risk, but might be any reason deemed sufficient by the company, or even its own caprice. *Held*, that after notice to insurer and mortgagee, the right was not affected by the mortgagee clause.

International Life Ins. & Trust Co. vs. Franklin Fire Ins. Co., N. Y. C. A., 5 Ins. Law Jour., 371.

9. A fire policy should be liberally construed in favor of the insured, and its clauses be given full legal effect, for his protection. It is no more sacred than any other contract. Exceptions in a policy should be strictly construed, and of two interpretations equally fair, that which gives the greater indemnity should prevail.

25 Wend., 374; May on Ins., §§ 174, 175.

West et al vs. Citizens' Ins. Co., Ohio S. C. C., 27 Ohio, 1; 5 Ins. Law Jour., 430.

10. Insurers have a right to insist upon the due observance of every policy condition assented to by the insured, and are entitled to the benefit of every restriction upon their liability provided for in the contract, but no strained interpretation must be given to

the policy conditions to the prejudice of the insured, and in no case must the language, by implication, be extended to embrace cases not clearly or reasonably within the very words of the condition as ordinarily used and understood.

Rann vs. Home Ins. Co. of Columbus, N. Y. C. A., 5 Ins. Law Jour., 515.

11. A provision in a policy, that the assured shall recover such a portion of the loss only as the sum assured bears to the whole amount of insurance, refers to the whole amount of insurance at the time of the loss, and does not impliedly require the assured to keep up other insurances on the property which were in existence when the policy issued. A policy contained a provision, that if the assured should make any other insurance on the property, or any part thereof, or if the property should be sold or transferred, or any change should take place in the title or possession thereof, without the company's consent, the policy should be void; and also a provision that when the property has been sold or otherwise disposed of, so that all the interest on the part of the assured has ceased, the insurance on such property should terminate. *Held*, that the insurance on the entire property is not, by this provision, forfeited by a sale of a portion of the property without the consent of the company.

Philadelphia, Wilmington and Baltimore Railroad Co. vs. Howard, 13 Howard, 340; Rodemar vs. Hazlehurst, 9 Gill, 294; Dibol & Plant vs. W. & E. H. Minot, 9 Iowa, 403; Smith, Leading Cases, v. 1, p. 42; Brown vs. Vind, 3 Md., 533; Withers vs. Reynolds, 2 Barnewell & Adolphus, 882; Miner vs. Bradley, 22 Pick., 457; Cunningham vs. Monell, 10 Johns., 203; Byram vs. Peabody Ins. Co., 8 W. Va., 605; Gould vs. York County Mutual Fire Ins. Co., 47 Me., 403; Lovejoy vs. Augusta Mutual Fire Ins. Co., 45 Maine, 472; Brown vs. People's Mutual Ins. Co., 11 Cush., 280; Friesmuth vs. Agawam Fire Ins. Co., 10 Cush., 587; Barnes vs. Union Mutual Fire Ins. Co., 51 Maine, 111; Lee vs. Howard Fire Ins. Co., 3 Gray, 533; Fire Association vs. Williamson, 26 Pa. St., 196; Gottsman vs. Pa. Ins. Co., 56 Pa. State R., 210; Associated Fire Ins. Co. vs. Assum, 5 Md., 165; Lockner & Co. vs. Holmes Mutual Ins. Co., 17 Mo. (2 Bennett), 247; 19 Mo., 628; Clark vs. New England Mutual Fire Ins. Co., 6 Cush., 343; Lane vs. Maine Mutual Fire Ins. Co., 3 Fairf. (Me.), 44; Hobbs et al. vs. Manuf. Ins. Co., 1 Sneed (Tenn.), 444; Wolf vs. Security Fire Ins. Co., 39 N. Y., 49.

A policy contained a provision, that if the interest of the assured is not truly stated, or be other than the entire, unconditional and

sole ownership, it must be so expressed in the policy under penalty of its forfeiture. *Held*, the policy is not rendered void by the fact that it simply describes the property as the property of the assured, and fails to mention that there was, at the time the policy issued, a deed of trust on the property insured, no inquiry having been made about the state of the title.

Shepperd vs. Union Mutual Fire Ins. Co., 38 N. H., 232; *Folsum vs. Belknap County Mut. Fire Ins. Co.*, 10 Fost. (N. H.), 231; *Howard Ins. Co. vs. Bruner*, 28 Penn. St. (11 Harris), 50; *Jackson vs. Massachusetts Mut. Fire Ins. Co.*, 23 Pick. (Mass.), 418; *Conover vs. Mutual Ins. Co. of Albany*, 3 Denio (N. Y.), 254; *Tittmore vs. Verm. Mut. Ins. Co.*, 20 Vermont, 546; *Same case*, 1 Comstock (N. Y.), 290; *Pollard vs. Somerset Mut. Fire Ins. Co.*, 42 Me., 221; *Smith vs. Monmouth Mut. Fire Ins. Co.*, 50 Me., 96; *Dutton vs. New England Mut. Fire Ins. Co.*, 9 Fost. (N. H.), 153; *Rollins vs. Columbian Mut. Fire Ins. Co.*, 5 Fost. (N. H.), 200; *Rice et al. vs. Tower*, 1 Gray, 426.

Cases of McCulloch vs. Ind. Mutual Fire Ins. Co., 8 Blackf., 50; *Indiana Mutual Fire Ins. Co. vs. Coquellard*, 2 Carter, 645; *Western Mass. Ins. Co. vs. Ricker*, 10 Mich., 279, distinguished.

Where no special inquiry is made, a statement that the property is his, is sufficient.

Strong vs. Manufacturers' Ins. Co., 10 Pick., 40; *Cumberland Valley Mut. Pro. Co. vs. Mitchell*, 48 Pa. St. R., 374.

Quarrier vs. Ins. Cos., W. Va. S. C. A., 10 W. Va., 507; 6 *Ins. Law Jour.*, 741.

12. The policy provided that "if the building insured stands on leased ground, it must be so represented to the company, and so expressed in the written part of the policy, otherwise the policy shall be void." *Held*, that the provision is one that the courts will enforce, and a failure to represent the fact that the building stood on leased ground, avoided the policy.

Kibbe vs. Hamilton Mutual Ins. Co., 11 Gray, 167.

But an adjustment of the damages with a knowledge of all the facts was a waiver of the benefits of the provision, although made in ignorance of the legal rights of the parties. Ignorance of the facts may furnish ground for recovery of money paid, or for avoiding a promise to pay, but ignorance of the law, the facts being known, will not.

Goodall vs. Dalley, 1 T. R., 712; *Williams vs. Bartholomew*, 1 Bos. & Pull., 326; *Donaldson vs. Mean*, 4 Dall., 109; *Crain vs. Caldwell*, 8 John. R., 384; *Garland vs. Salem Bank*, 9 Mass., 408; *Stevens vs. Lynch*, 12 East., 38; *Lun-*

die vs. Robertson, 7 East., 231; Bilbie vs. Lumley et al., 2 East., 409; Lowrie vs. Bourdieu, Doug., 476; Duryee vs. Dennison, 5 Johns., 248; Dow vs. Smith, 1 Caines (N. Y.) R., 32.

Eagan vs. Aetna F. & M. Ins. Co., W. Va. S. C. A., 10 W. Va., 583; 6 Ins. Law Jour., 832.

13. The policy provided that "the company shall not be liable to make good any loss or damage by fire, which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power," etc. The property was situated in Glasgow, Mo., which was attacked by the rebel forces, and the military commander being unable to hold the place, ordered the destruction of the military stores. The City Hall containing them was fired as the only available means of executing the order, and the flames communicated through two or three intervening buildings to the property. *Held*, that the proximate cause is the efficient cause though not necessarily that which was nearest in time or place.

Phillips on Ins., sec. 1096, 1132; Brady vs. Northwestern Ins. Co., 11 Mich., 425; St. John vs. Am. Mut. Ins. Co., 1 Kernan, 519; Gordon vs. Remington, 1 Camp., 123; Lynd vs. Tynsboro, 11 Cush., 563; Ins. Co. vs. Tweed, 7 Wal., 44; Butler vs. Wildman, 3 B. & Ald., 393; Barton vs. Home Ins. Co., 42 Mo., 1, 156; Marcy vs. Merch. Mut. Ins. Co., 19 La. An., 388; Milwaukee, etc. R. R. Co. vs. Kellogg, 94 U. S., 475.

Held, that the proximate cause of loss was an invasion, or military or usurped power, and that the company was not liable.

Aetna Ins. Co. vs. Boon et al., U. S. S. C., 5 Otto, 117; 6 Ins. Law Jour., 933.

14. The insured kept a dry goods and grocery store at A., where the insurance was effected through the local agent. *Held*, that it was not error to exclude the testimony of experts as to the meaning of the terms, "dry goods," and "groceries," in the policy, where the witnesses did not speak of the import of those terms at A. It might perhaps be the duty of the court to instruct, as a matter of law, that the terms as used include such goods and merchandise as are usually kept in such stores as are called dry goods and grocery stores, at the place where the insured did business.

Germania Fire Ins. Co. vs. Francis, Miss. S. C., 52 Miss., 457; 6 Ins. Law Jour., 235.

15. The policy insured K. and his "legal representatives" against loss by fire. *Held*, that the policy was not intended to inure to the benefit of the heirs. The administratrix had a right to maintain an action for recovery in Virginia.

Haxall vs. Shippen, 10 Leigh, 536, distinguished.

Conditions in the nature of forfeiture must be liberally construed in favor of the insured. The policy provided that any change material to the risk, within the control of the insured, should avoid it. *Held*, that the provision referred to a change in the physical condition of the risk itself, not to such a change as might be involved in its becoming vacant. A provision that the policy shall be void if the title be transferred or changed, does not include a devolution of the title upon the heirs by death of the insured.

Burbank vs. Rockingham Mut. F. Ins. Co., 4 Fos. (N. H.), 550.

A judicial sale under a creditor's bill, which was never completed, but was excepted to and never confirmed by the court, and was afterward vacated, and the purchaser was never entitled to possession, was not the foreclosure of a mortgage which, according to its terms, avoided the policy.

2. Dan. Ch. Pract., 1274, 1281.

Georgia Home Ins. Co. vs. Kinnier, Va. S. C. A., 6 Ins. Law Jour., 497.

16. The application covenanted that it was a just, true, and full exposition of all material facts and circumstances in regard to the condition, situation, value, and risk of the property, so far as known to the insured. The policy made the application a warranty, and in another part recited that it should be void if the insured "makes any erroneous representation, or omits to make known any fact material to the risk." *Held*, that the clauses of the policy and application must be reconciled if possible, and they are inconsistent with an absolute warranty of the truth of the statements of the insured, irrespective of the circumstances. *Held*, that an over-statement of the value of the property in the application, if made in good faith, was but the expression of an opinion, and did not avoid the policy.

First Nat. Bank vs. Hartford F. Ins. Co., U. S. S. C., 7 Ins. Law Jour., 208.

17. A part of the incumbrance had not been stated in the application, which was a warranty; additional insurance had been procured without the consent required in the policy, and no arbitration had been offered or proposed as required by the policy before bringing suit. The loss was payable to L. B. as interest may appear. *Held*, that it was not a mortgage insurance, but directly on the interest of the owner. *Held*, that the arbitration clause was a barrier to recovery.

Flaherty vs. Germania Ins. Co., Pa. S. C., 7 Ins. Law Jour., 226.

18. The policy was of the common printed form, but the blanks for the *termini* of the voyage were unfilled. In manuscript were the words "port risk in the port of New York." *Held*, that it was obvious a voyage from one port to another was not contemplated, but the words "port risk," etc., did not clearly indicate to a non-professional mind the nature of the risk assumed in the port of New York. *Held*, that the words "port risk" were restrictive of the phrase. Their meaning is not strictly a question of usage; they are used not as two ordinary words in a special sense, but as a compound word having a technical meaning, which requires explanation to the uninitiated.

Walls vs. Bailey, 49 N. Y., distinguished.

Held, that the testimony of experts was proper to explain their meaning. *Held*, that the evidence being agreed that the term "port risk" meant a risk upon a vessel while lying in port, and before she had taken her departure for another voyage, it was the duty of the court to dismiss the complaint, where it was admitted that the injury happened after the vessel had taken her departure for another voyage. *Held*, that the question of usage was not involved, but simply the meaning of a technical term, as to which competent testimony was admissible. *Held*, that a witness who was only acquainted with the words in a general way, but had no special knowledge of their actual use in practical business, was not qualified to speak as an expert, and his evidence was properly excluded.

Carter vs. Boehm, 1 Smith's Lead. Cases, 286, note; *Jones vs. Tucker*, 41 N. H., 546.

Nelson vs. Sun Mut. Ins. Co., N. Y. C. A., 7 Ins. Law Jour., 136.

19. Buckwheat was shipped in bulk, in a tow of three barges, and insured under an open policy, with a memorandum indorsement, as follows: "Conveyance, Mohawk and barges from Lansing to St. Louis; property, 39,085 bushels buckwheat at \$1.15 per bushel; sum, \$44,945; rate, 1; premium, \$449.41." The policy provided among other things, "that each package was to be subject to its own average, and in case of partial loss, the loss should be ascertained by a separation of the contents of the package so damaged;" also, that "the insurers should not be liable for any partial loss on corn or grain of all kinds, unless it should amount to 20 per cent, exclusive in all cases of all charges and expenses incurred for the purpose of ascertaining and proving the loss." The contents of one of the barges was damaged by water through a collision. *Held*, that each specific bushel did not constitute a package within the meaning of the policy. *Held*, that the 20 per cent must be estimated not according to the amount damaged, but according to the value. *Held*, that the amount of the loss after deducting the sum realized for the damaged wheat, being less than 20 per cent of the value either of the whole shipment or of the grain in that barge, the company was not liable.

Hernandez vs. Sun Mut. Ins. Co., 6 Blatch. C. R., 317; Newlin vs. Ins. Co., 20 Penn., 312.

Held, that the case is not affected by evidence of an amount of grain shipped in the barge in excess of that mentioned in the policy or accounted for, which was not shown to be lost by any peril insured against. *Held*, that the clause, "each package shall be subject to its own average," only refers to a shipment in bags, bales, boxes, or parcels, and when a valuation and average on each is secured by the shipper, and has no relation to a shipment in bulk. *Held*, that the memorandum clause is not inconsistent with the other clauses.

Stephens & Bennett on Ins., 439; 3 Kent's Com., 370.

Haenchen et al. vs. Franklin Ins. Co. et al., Mo. S. C., 67 Mo., 156; 7 Ins. Law Jour., 546.

20. When a policy of insurance is issued by an insurance company upon a steamboat for a year, with permission to navigate the Mississippi and tributaries, and on the trial of a cause to

recover the value of the steamboat, it is proven that the steamboat was lost in Cypress Bayou, and that Cypress Bayou was navigable by steamboats, and that said bayou emptied into the Red River, and that Red River emptied into the Mississippi; *Held*, that said Cypress Bayou was a tributary of the Mississippi within the meaning of said policy. In the interpretation of a policy of insurance, in all cases it must be liberally construed in favor of the insured, so as not to defeat without a necessity his claim to the indemnity which, in making the insurance, it was his object to secure; and where the words are without violence susceptible of this interpretation, that which will sustain his claim and cover the loss must in preference be adopted. In construing an instrument prepared by the insurer, it ought to be read strongly against the maker.

Miller vs. Citizens' F. & M. Ins. Co., W. Va. S. C. A., 17 W. Va., 116; 7 Ins. Law Jour., 378.

21. The policy on a vessel contained the stipulation, "the risk to be suspended while vessel is at Baker's Island loading." The vessel was lost while at Baker's Island, before the loading had begun. *Held*, that the intention of the parties in the stipulation must be determined from all the circumstances of the case.

1 Greenl. Ev., § 277; Taylor's Ev., §§ 1082, 1085.

Where it appeared that the hazards sought to be excepted, were those attendant on the exposure and unfavorable moorage at the island, and not the mere process of loading; *Held*, that the meaning of the clause was, that the risk should be suspended while there for the purpose of loading. *Held*, that the insurer was not liable for the loss.

Reed vs. Merchants' Mutual Ins. Co., U. S. S. C., 5 Otto, 23; 7 Ins. Law Jour., 310.

22. The policy contained a condition that the insurance should cease in case the property was levied on or taken into legal custody, or in case an incumbrance should fall or be executed on the property which reduced the insured's interest below the amount insured, and he failed to notify the company. It was also declared in the body of the policy that payment was to be made in conformity with the conditions. *Held*, that the conditions formed a

part of the contract, and a judgment of sufficient amount, though no levy was executed, avoided the insurance where the company was not notified.

Kensington National Bank vs. Yerkes, Pa. S. C., 7 Ins. Law Jour., 735.

23. The insured were manufacturers of machinery, and kept wooden patterns to make the iron castings needed for the machines, the patterns being sent to the various foundries where the castings were procured. The policy insured "their fixed and movable machinery, engines, lathes and tools." *Held*, that there was no ambiguity in the terms of the policy, and parol evidence was inadmissible to show that the parties intended to include the patterns in the word "tools." *Held*, that the policy covered all patterns which from their size and shape admitted of being applied and managed by the hands of one man.

Lovevell et al. vs. Relief and Westchester Ins. Cos., Mass. S. J. C., 124 Mass., 418; 7 Ins. Law Jour., 672.

24. The insurance was effected by an open policy on goods consigned to plaintiffs upon vessels from Brazil, "to New York, Baltimore or Boston direct, or via Hampton Roads for orders." The rate was specified in writing to be one per cent throughout the year, followed by the printed clause "with additions and deductions to conform to the rates of the company when the character of the risk and vessel and time of sailing are known." The policy provided that the risks were to be reported for indorsement as soon as known. Through mistake, a risk, whose charter party also required the master to call at Hampton Roads for orders, was reported as from Brazil to New York and so indorsed. The vessel put into Hampton Roads for orders and remained there 18 days while the plaintiffs were endeavoring to negotiate for a sale of goods, the market being depressed. At the end of that time she was sunk by a collision. *Held*, that insured property need not be specified in open policy, but the risk must be declared as soon as known to the insured.

1 Arnold on Mar. Ins. (4 Ed.), 318, 319; *E. Carver Co. vs. Manuf. Ins. Co., Gray, 214.*

Held, that the rate was fixed by the writing and nothing was

to be done at the time or after the declaration of the risk to make the contract complete. There was no damage to the underwriter through the error in reporting the risk, and the indorsements were not a condition precedent but subsequent, in which errors could be corrected even after loss. *Held*, that the policy was not avoided by the erroneous declaration. The insurance was not on a risk direct to New York, but via Hampton Roads, and there was no deviation.

Robinson vs. Touray, 3 Camp., 158; 1 Arnold on Mar. Ins., *supra*; *E. Carver Co., supra*; *Gledstane vs. Royal Ex. Ins. Co.*, 5 Best & Smith, 797; *Stephens vs. Aust. Ins. Co.*, L. R., 8 C. P., 18. *Case of Orient Mut. Ins. Co. vs. Wright*, 23 How., (U. S.), 401, distinguished.

Held, that the delay at Hampton Roads was not unreasonable, if necessary to enable plaintiffs to find a profitable market, and was no deviation.

Mount vs. Larkins, 8 Bing., 122; *Grant vs. King*, 4 Esp., 175; *Coolidge vs. Gray*, 8 Mass., 527; *King vs. Middletown Ins. Co.*, 1 Conn., 184; *Clark vs. United F. & M. Ins. Co.*, 7 Mass., 365; *Lapham vs. Atlas Ins. Co.*, 24 Pick., 1; *Gilfort vs. Hallet*, 2 Johns. Cases, 296; *Metcalf vs. Parrey*, 4 Camp., 124; *Thorndike vs. Bordman*, 4 Pick., 471; *Chase vs. Eagle Ins. Co.*, 5 Pick., 51; 2 *Parsons on Marine Ins.*, 16.

Held, that indorsements stipulating for an extra premium, in case of detention of vessel at place of call beyond a limited time, gave no new or additional liberty to insured as to the use of a place of call, which was still regulated by the terms of the original contract. *Held*, that the case was not affected by the fact that the charter party was for a voyage to New York, Philadelphia or Baltimore, while the insurance was to New York, Boston or Baltimore. The insured could choose either New York or Baltimore, and a mere intention to go to Philadelphia from Hampton Roads, would not constitute a deviation.

Arnold vs. Pacific Mut. Ins. Co., N. Y. C. A., 78 N. Y., 7; 8 *Ins. Law Jour.*, 869.

25. A policy of insurance upon household furniture, "wearing apparel," etc., described the property as being situate in a house on a certain lot. *Held*, that with reference to the wearing apparel the policy contemplated that it might be used in the ordinary way, and that the house was to be regarded only as its place of deposit when not in ordinary use and that the company was liable

for its loss by fire, while being worn away from the house. Wearing apparel does not come within the term "household furniture."

McCluer vs. Girard F. & M. Ins. Co., 43 Iowa, 349.

Longueville vs. Western Ass. Co., Iowa S. C., 8 Ins. Law Jour., 845.

26. The M. S. Co., claiming to be a corporation, and conducting a certain business, took out a policy of insurance upon personal property, which it claimed to own. *Held*, that as, if the association was not a corporation, it was in law a partnership, and as such could hold personal property and make contracts in the name it assumed, it is immaterial, so far as concerns the validity of the policy, whether it was or was not a corporation. The policy was upon thirty-six mules, "all contained in the two-story frame barn, (36 x 100 ft.), situate (detached) on Sec. No. 19, Town No. 140, Range 43; in Becker County, Minnesota." *Held*, that the words "all contained in," etc., are merely matter of description for identification of the property insured, and not a warranty that the mules should remain in the barn, nor a condition that the risk should cease if they were taken out of it.

Everett vs. Ins. Co., 21 Minn., 76.

Contracts of insurance, are, unless the language forbids it, presumed to be made with reference to the character of the property insured, and to the owner's use of it in the ordinary way, and for the purpose for which such property is ordinarily held and used, and a general condition against increase of risk must be held to refer to the risk incident to such use.

Holbrook vs. St. Paul F. & M. Ins. Co., Minn. S. C., 25 Minn., 229; 8 Ins. Law Jour., 780.

27. Insurance was on "brick pottery building and ells," and on machinery, stock in trade, and office furniture "contained in said building, situate on Dwight Street." The plaintiffs were manufacturers of earthenware; their manufactory consisted of two buildings: one known as the pottery, with three ells attached; the other known as the storehouse. The first contained the engines, most of the machinery, and the office, and was chiefly used for manufacture, while the second was chiefly used for storage,

though it contained a limited amount of machinery, and some of the processes were carried on there, and most of the stock passed several times between the two buildings in process of manufacture. The two were connected by a wooden corridor three stories high, six feet wide, and fifteen feet long. *Held*, that the policy applied only to the pottery and its contents.

Hews et al. vs. Atlas Ins. Co., Mass. S. J. C., 126 Mass., 389 ; 8 Ins. Law Jour., 291.

28. Policy was "on the contents" of certain buildings. An indorsement permitted its removal to another building, and was signed by the secretary, but was not under seal like the policy. The loss occurred after removal. *Held*, that the only liability was by virtue of the indorsement, which was not an extension of the original contract, but a new contract by parol.

R. R. Co. vs. Ins. Co., 32 Md., 37 ; Ins. Co. vs. Gusdorf, 43 Md., 506.

Held, that assumpsit and not covenant was the proper form of action.

Deale's case, 18 Md., 51, and cases there cited.

Shertzer vs. Mut. F. Ins. Co., Md. C. A., 8 Ins. Law Jour., 72.

29. A contract is fair and reasonable when it expresses that representations affecting the risk are warranted ; and if its meaning were doubtful a court will not construe the language so as to avoid the policy for trifling and immaterial matter which neither party probably considered at the making of the contract.

Cooper vs. Farmers' M. F. Ins. Co., 14 Wr.; 305. Distinguished.

Watertown F. Ins. Co. vs. Simons, Pa. S. C., 9 Ins. Law Jour., 597.

30. The policy insured among other things, "grain in stacks and grainary on farm." The property destroyed was 150 bushels of unthreshed flax in stock, which was raised solely for the seed and not for the fiber. *Held*, that while it may be doubtful as a matter of abstract law, whether or not in all cases, flax seed is grain, and in such case the question is for the jury, here, the intention of the parties was to include the flax seed in the term grain.

Decatur B'k vs. St. Louis B'k, 21 Wall., 294; State vs. Williams, 2 Strobbart, 474; Holland vs. State, 34 Ga.

Hewitt vs. Watertown F. Ins. Co., Iowa S. C., 10 Ins. Law Jour., 375.

31. A printed clause in the policy warranted the boat to be safely moored between specified dates, in a place satisfactory to the company. Following this was a written clause, giving privilege to lighter in New York harbor. This was not availed of, but the boat was laid up without notice to the company, but with notice to the broker who procured the insurance, and received a commission on the same from the company, but without authority to act as its agent. *Held*, that notice to the broker was not notice to the company. He was the agent of the insured, and his declarations to the contrary to the insured did not affect the case.

Mellen vs. Hamilton Ins. Co., 17 N. Y., 609.

Held, that the privilege to lighter, if not availed of, did not excuse notice to the company. *Held*, that the failure to notify the company was a breach of the warranty which avoided the policy. *Held*, that a denial of liability, hastily based on other grounds, when not accompanied by an intention to abandon the real grounds, was not a waiver of the latter.

Brink vs. Hanover Ins. Co., 80 N. Y., 108, distinguished.

The policy provided that acts of the insurers in preserving the property, should not be considered as affirming or denying liability. *Held*, that directions regarding storing the property saved was not a waiver of the defense.

Devens vs. Merch. & Traders' Ins. Co., N. Y. C. A., 10 Ins. Law Jour., 133.

32. A policy taken out by piano and music dealers against loss by fire, describing the property as "their own, or held in trust," will, in the absence of evidence to the contrary, cover a piano left with them for sale or rent; but oral evidence is admissible to show what goods were intended to be and were insured under the general words of the policy. In action against the insured for money had and received, by one who claimed that his goods were covered by the policies of insurance, the amount of which the insured had collected, secondary evidence may be given of

the contents and terms of the policies, where they have been canceled, and returned to the insurer in a foreign country. A general exception to the entire charge of the court, enunciating separable and distinct propositions of law, will be unavailing if any one of its separate propositions is correct. One who effected insurance covering his own and other goods, stored with him, and collected the amount of the policy on the happening of the loss, cannot defeat an action by the owner of such goods for his share of the insurance money, because such owner never requested any insurance, and did not know that it was taken out until after the loss, and failed to ratify, expressly or otherwise, the acts of the warehouseman in taking out the policy, before the payment of the loss. In such case the insured holds the amount collected as trustee for the owner of such goods, as well as those held in his own right, and the failure to make proof of loss of the goods of other persons, the value of his own goods being more than the amount of the policy, which he collected in full, will not prejudice the rights of such persons; nor can he claim to have the loss of his own goods first made good out of the fund received, before owners of the other goods can share therein.

Snow vs. Carr, Ala. S. C., 61 Ala. R., 363.

33. Barn, sheds, etc., destroyed by sparks from steam threshing machine. Defendant knew buildings were occupied by tenant. Policy stipulated that company would not be liable for damage caused by "any locomotive engine," with usual provision that company should be notified of any material increase of risk, change of occupant, etc. It was agreed on trial that the said barn, etc., "were destroyed by fire which was *communicated to the said buildings* by sparks from a steam threshing machine used *on the premises* by a tenant for the purpose of threshing out a crop of wheat." *Held*, that there was no evidence of a violation of any condition of the policy by the assured, as the agreement of facts contained no statement that the insured himself used the engine either in or near the insured buildings, or even authorized or assented to such use of it, or even that the tenant introduced the engine *into* the barn or corn house, or *under* the sheds, and used it there for the purpose of threshing his wheat. A resolu-

tion of the board of directors of the insurance company prohibiting the use of such machines within 200 yards of insured property upon certain qualifications, passed subsequent to the issuance of the policy to the plaintiff, not communicated to him, and of which he had no notice or knowledge, could not affect his rights under the policy.

Martin vs. Mut. F. Ins. Co., Md. C. A., 45 Md., 51.

34. A provision in a policy of insurance that the application for insurance shall be considered as a warranty, and that if the property insured is overvalued in it, the policy shall be void, applies only where the statement as to value is intentionally false. So also, where the policy provides that all fraud, or attempt at fraud, by false swearing as to the loss, shall cause a forfeiture of all claim under the policy, a wrongful or intentional false swearing is intended, and not a mere discrepancy or innocent error. Whether fraud is to be inferred from an excessive statement of the value of the property in the original application, or of the loss in the preliminary proofs, is a question of fact; and in neither case does a *legal* presumption of fraud arise; nor is the burden cast upon the insured to show that his statement was not intentionally false. *Held*, accordingly, that it was error in the court below to instruct the jury that the existence of a discrepancy between the statement of the assured as to his loss, and the actual loss, would give rise to a *prima facie* presumption of fraud; but that as the instruction was in favor of the losing party, it must, perhaps, for the purposes of this case, be accepted as law.

Helbing vs. Sea Ins. Co., Cal. S. C., 54 Cal. R., 156.

35. A policy of insurance upon a stock of goods to be sold and replenished, covers as well the additions made from time to time after the insurance was effected, as those on hand when the policy was issued. Where a policy of insurance provides that, in case of loss, the assured shall produce the certificate of an officer nearest the place of the fire, etc., and there are several officers in the same immediate neighborhood, the certificate of any one of them will be a sufficient compliance with the requirement of the policy, and a distance of a few yards more or less from

the scene of the fire will not be regarded as a matter of any importance.

Amer. Cent. Ins. Co. vs. Rothschild, Ill. S. C., 82 Ill. R., 116.

36. The contract of fire insurance, with its terms and stipulations, must be in writing. No stipulation is more material than period of time for which insurance is effected.

Clark, Rosser & Co. vs. Brand & Hammons, Ga. S. C., 62 Ga., 420.

37. Words in a policy are to be construed in their ordinary and popular sense, unless they have acquired by usage of trade and the like, in connection with the subject matter, a distinct technical sense. Where a word has both a popular and technical sense, the meaning is one of fact for the jury. But where words have acquired an exact and technical meaning in any business, and are used in a contract relating to such business, they are *prima facie* to be construed in the sense which they have acquired, and failure to so instruct a jury upon request, leaving them to interpret by their unaided judgment, is error calling for reversal.

Daniels vs. Hudson River Ins. Co., 12 Cush., 430; Whitmarsh vs. Conway Ins. Co., 16 Gray, 359; Lowry vs. Russell, 8 Pick., 358; Sawtelle vs. Drew, 122 Mass., 228; Taylor vs. Briggs, 2 C. & P., 525; Nordin St. Co. vs. Dempsey, 1 C. P. D., 654; Heald vs. Cooper, 8 Me., 32; Thompson vs. Sloan, 23 Wend., 71; Dalton vs. Daniels, 2 Hilt., 474; Wayne vs. Steamboat Gen. Pike, 16 Ohio, 421; Doane vs. Dunham, 79 Ill., 131; Pilmer vs. State B'k, 16 Iowa, 326; Appleman vs. Fisher, 34 Md., 554; Carter vs. Phila. Coal Co., 77 Penn. St., 286.

Houghton vs. Watertown Ins. Co., Mass. S. J. C., 10 Ins. Law Jour., 547.

38. The illegal sale of liquors, where such sale is but a subordinate part of the legitimate business of a druggist, does not vitiate the policy on his stock including such liquors. A contract directly insuring liquors intended for illegal sale would be void, but if the contract is collateral and independent, though in some manner connected with acts done in violation of law, it is not void.

Boardman vs. Merrimack F. Ins. Co., 8 Cush., 583; Kelly vs. Home Ins. Co., 97 Mass., 288; Johnson et al. vs. Union M. & F. Ins. Co., Lawrence vs. Nat. F. Ins. Co., 127 Mass., 555; Niagara F. Ins. Co., vs. DeGraff, 12 Mich., 124.

Carrigan vs. Lycoming F. Ins. Co., Vt. S. C. 10 Ins. Law Jour., 606.

39. The certificate of a magistrate is a condition precedent to a suit, when the policy stipulates that it shall not be payable until such certificate is produced.

Johnson vs. Phoenix Ins. Co., 111 Mass., 49.

A policy stipulation that the magistrate shall not be concerned in the loss as a creditor, does not disqualify every magistrate who may chance to be a creditor to a trifling amount, but simply one who might be supposed from the fact to have a personal interest in the policy.

Dolliver vs. St. Joseph F. & M. Ins. Co., Mass. S. J. C., 10 Ins. Law Jour., 380.

40. The insurance was on a hop-house "while drying hops" from August 15 to October 15. *Held*, that intention was to insure only while drying hops, and the work having ceased at the time of fire, the policy did not apply, though the time had not expired.

Langworthy vs. Oswego and Onondaga Ins. Co., N. Y. C. A., 10 Ins. Law Jour., 546.

41. The insurance was on paper on a canal boat. The policy provided that the boat might load in such manner as was customary without reference to marine laws or customs. Also that the company should not be liable for goods on deck unless by special agreement. *Held*, that the intention was to exclude deck loads except where it was customary to so load, and the custom of carrying paper on deck being shown, the policy was liable.

Lenox vs. U. S. Ins. Co., 3 J. Cas., 178; 2 Phil. on Ins., 179.

Held, that knowledge of the agents as to the manner of carrying the paper, waived the policy limitation.

Shearman vs. Ins. Co., 46 N. Y., 526; *Richmond vs. Ins. Co.*, 79 id., 230.

Held, that acts of clerks in charge of the office of the agents and performing their business, were the acts of the agents. If the meaning of the policy is ambiguous, that meaning is to be given which is most favorable to the insured.

Marvin vs. Stone, 2 Cow., 806; *McMaster vs. Ins. Co.*, 55 N. Y., 222; *Rann vs. Ins. Co.*, 59 id., 387.

Allen et al. vs. St. Louis Ins. Co., N. Y. C. A., 10 Ins. Law Jour., 504.

42. By the terms of one clause of the policy, a part of the loss was payable to the "N. W. Life Ins. Co." but that clause was undoubtedly inserted for the benefit of the plaintiff, the "N. W. Mutual Life Ins. Co." On appeal from a judgment in plaintiff's favor; *Held*, that as the policy contains only a defective (and not a wrong) statement of plaintiff's legal name and style, which could not mislead defendant to its prejudice, the judgment is not erroneous by reason of such defect. The policy insured against fire a "three story, brick, gravel roof, hotel building, occupied by the assured, and known as the 'Tremont House,' situated on lots 9 and 12," etc. etc., and it granted permission to light the premises with gasoline, but provided that no gasoline should "be stored on the premises." *Held*, that the word "premises" means the building insured; and the assured was not prohibited from depositing gasoline, provided for use in the hotel, in reasonable quantities, on his lots outside of the hotel. Whether the depositing of gasoline in the building itself, to be used therein, would be a storing within the prohibition of the policy: *quære*. With knowledge that at the time of the loss, there was a breach of condition in the policy as to the location of the gas-blower and generator, defendant's adjusting agent subsequently objected to the proofs of loss furnished by the assured, merely on the ground that they were not made out in the form used by defendant, and sent him printed blanks for that purpose, which the assured (though not at any great expense) filled out and sent to him in compliance with his request. By the terms of the policy, the loss was not payable until sixty days after due proof thereof. *Held*, that the case is within the principle of *Webster vs. the Phoenix Ins. Co.*, 36 Wis. 67, and the breach of the policy in respect to the gas-blower and generator was waived.

N. W. Mut. Life Ins. Co. vs. Germania F. Ins. Co., Wis. S. C., 40 Wis., 446.

43. Defendant is, under this policy, liable for the value of the stacks of grain described in the complaint. The fact that in the printed form of application furnished by the company there is a limitation inserted as to "hay in stack," which is entirely omitted from the specification as to "grain in stack," favors the construc-

tion of the contract above given. The specification as to "live stock running at large," cannot reasonably be limited to live stock running at large on section 19, and this also favors the view that the words "grain in stack" are not to be limited to grain stacked in that section. Fire insurance, on time, by open policies, of the future material productions of the assured in the course of his business, in his trade or calling, are valid contracts of indemnity, and not wager policies. And the policy in suit is valid as applied to the loss for which a recovery is here sought, although the grain destroyed was raised by plaintiff upon land acquired by him after the date of the policy.

Sawyer vs. Dodge County Mut. Ins. Co., Wis. S. C., 37 Wis., 503.

44. The provision of the St. of 1864, c. 196, that in policies of fire insurance, "The conditions of the insurance shall be stated in the body of the policy," is complied with by a statement of the substance of the condition on the face of the policy, with a distinct reference to the schedule or details of regulations printed upon a subsequent page of the instrument, but a mere general declaration upon the face of the policy that it is "made and accepted in reference to the conditions hereunto annexed, which are hereby made a part of this policy, and to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for," is of no effect. A policy on a building, provided that if the premises at the time of the fire should be in whole or in part occupied for any purpose considered, rated or classified as more hazardous, in the printed conditions annexed, than that described in the application, unless permission was given, the policy should be void. *Held*, that the provision did not apply to a condition requiring a statement of the interest of the insured, or to a condition that in case of other insurance the insured should be entitled to recover no greater proportion of the loss sustained than the sum insured bore to the whole amount insured, or to a condition requiring notice of a building insured became vacant or tenantless for thirty days, there being other conditions containing a classification of risks as hazardous, extra hazardous, or specially hazardous. The

policy contained a clause by which it was agreed that the amount of the loss was to be paid sixty days after due notice and proofs of the same made by the assured "in accordance with the terms and conditions of this policy." *Held*, that a condition on the back of the policy stating the manner of making proof of loss, was not so referred to as to make a part of the policy under the St. of 1864, c. 196.

Mullaney vs. National Ins. Co., Mass. S. J. C., 118 Mass., 393.

45. The policy described the property insured as "contained in three-story granite building." *Held*, that the phrase might designate a building with a granite front only, and three stories in the front and rear, though only one story high in the middle; and that if such was the fact, all the property of the kind described in the policy, contained in the building, was covered by insurance.

Medina vs. Builders' Ins. Co., Mass. S. J. C., 120 Mass., 225.

46. When goods are insured on a memorandum or open policy, entries of shipments made on a blank-book to which the policy is attached, are as if made on the policy sheet. Where the previous dealings imply such consent, express consent of the company to each indorsement on the policy is not necessary.

A policy requirement that all shipments must be reported at the company's office, is sufficiently complied with by properly mailing the reports to the company when so instructed by the agent.

Edwards vs. Miss. Valley Ins. Co., St. Louis (Mo.) C. A.

47. William Nelson, Jr., insured with the Sun Mutual Insurance Co., \$6,250 on the hull of the ship Confidence for one month, from Oct. 5th, 1867, in the port of New York, against a port risk. On the 28th October, 1867, the ship being loaded with cargo, in charge of a pilot, and in tow of a steam tug, left her berth to proceed to sea, being then bound on a voyage to the port of Glasgow. In proceeding down the river the ship got on a reef, and after being hauled off was taken to a berth where her cargo was discharged. She was then placed in the dock, and after repairing her damages, she reloaded her cargo, and completed her voyage to

Glasgow. The claim on the Sun Co. was for repairs by getting on the reef, and also for certain charges in the nature of a general average assessment upon the interests concerned in the voyage to Glasgow, and amounting in all to about \$1,000 on the policy of the Sun Co. The defense was that the words "port risk," inserted in the application by the applicant, and contained in the policy, was a limitation of the risks covered under the policy to those incident to a vessel lying in port, and did not cover any risks connected with the voyage: That as soon as the ship proceeded on her voyage, she was no longer covered under the port policy. There was no dispute as to the fact that the ship was in the prosecution of a voyage to Glasgow when the accident occurred. Witnesses on the part of the defense were produced to show that the words "port risk" had a limiting effect upon the policy, and should be construed as words intended to contradistinguish such risks from voyage risks; that the port risk as used in the policy was understood by underwriters and merchants to terminate at the moment the voyage begins. It also appeared that the ordinary rate of premium on such a port risk was a nominal one, being one quarter of one per centum a month, while the premium on the voyage on which the vessel was engaged at the time of the accident, and which would last about as long, was ten times as much. The evidence and the authorities being in favor of this construction, the judge directed the jury to give a verdict for the defendant.

Nelson vs. Sun Mutual Ins. Co., N. Y. Sup. Ct., 4 Ins. Law Jour., 238.

48. Insurance on "stock of provisions" in a pork packing establishment, includes everything used as food, together with the salt and other condiments used in curing it, but does not include ice used for cooling, whose operation is merely mechanical. "Stock of pork in cellar" does not include lard in casks. Saltpetre necessary to curing, is not in violation of the policy because specified among the scheduled articles as extra-hazardous. Friction matches in the quantity needed for use are not extra-hazardous.

Krans & Co. vs. Balt. Ins. Co. et al., Balt. (Md.) Superior Court.

49. The policy was from the 22d of January, 1872, to the 23d of January, 1873, both inclusive. The words "*at and from*" in the printed form which was used, and "for this present voyage," and other words which are usual in a voyage policy, were not erased or struck out. *Held*, that the policy was really a time-policy, and that its character was not affected by the printed words negligently left in the form. In a time-policy the law, in the absence of special stipulations in the contract, does not imply any warranty that the vessel should be seaworthy. *Gibson vs. Small*, and other cases were authoritatively declared by the House of Lords to have set at rest all the controversies on this subject. If a shipowner knowingly and willfully sends his ship to sea in an unseaworthy condition, the knowledge and usefulness are essential elements in the consideration of his claim to recover. A loss caused immediately by perils of the sea is within the policy, though it might not have occurred but for the concurrent action of some other cause which is not within the policy.

Dudgeon vs. Pembroke, Eng. House of Lords, L. R. 2 App. Cas., 784.

50. The policy was "at and from the port of P. to N., and for 15 days after her arrival." Cargo was discharged, and injury received while receiving new cargo, within the fifteen days, at another place in the port of N. *Held*, that the policy was a voyage-policy, with a time-policy grafted on it, and insurers were liable.

Gambles vs. Ocean Mar. Ins. Co., Eng. Ex. L. R., 1 Ex. D., 141.

51. The policy was on tobacco in stock and in process of manufacture in a building occupied for storage and manufacture of tobacco. Permission was granted to manufacture tobacco from June 1 to September 1. On the day preceding the fire in March, insured had been boiling liquorice and sugar, steeping tobacco therein, and drying that which had been steeped, in a dry-house attached. The policy also prohibited any manufacture involving the use of fire heat. *Held*, that the express permission excluded the right to manufacture at any other time of year.

Held, that the term building involved a latent ambiguity, and it was for the jury to determine what was included in it. *Held*, that the word manufacture involved a latent ambiguity, and it was for the jury to say whether it is a divisible process, and the operation described was such within the meaning of the policy, or only a preparatory process, a working of tobacco, as claimed by insured.

Stovall & Co. vs. Firemen's Ins. Co., Balt. (Md.) Sup. Ct., 9 Ins. Law Jour., 159.

52. Insurance was effected on a voyage from Spain to Newcastle, "and for fifteen days whilst there." The vessel had discharged her cargo at Newcastle and was proceeding to another place in the same port to complete a fresh one for another voyage when the loss occurred. *Held*, that there was deviation and the insurers were not liable.

Gambles vs. Ocean Marine Ins. Co., Eng. C. A., 5 Ins. Law Jour., 159.

WHAT PROPERTY IS COVERED.

53. The plaintiffs, the P. & W. R. R. Company, procured insurance in the defendant insurance company, the policy of insurance containing the following proviso: "Provided, all the property hereby insured is on premises owned or occupied by the Providence and Worcester Railroad Company, in Massachusetts and Rhode Island. * * * It matters not whether the property is in motion on the road, at rest, or in buildings." *Held*, that by reason of this proviso the defendant insurance company was not liable for a loss occurring upon premises not used or occupied by the plaintiffs at the time of the issuing of the policy, although owned and occupied by them at the time of the loss.

Providence & Worcester Railroad Co. vs. Yonkers Fire Ins. Co., R. I. S. C., 5 Law Ins. Jour., 323.

54. Where an insurance policy provides that in case of the loss of partnership property, on which other companies have also issued policies, it shall be held for only its ratable share, it was held that an individual policy which, in adjusting the losses, had been

by the common consent of all parties treated as a firm asset, and as covering the firm property, was so far within this stipulation, that the company issuing the individual policy, must be held liable as for an insurance of the partnership property.

Liverpool, London, and Globe Insurance Co. vs. Verdier, Mich. S. C., 33 Mich., 138; 35 Mich., 395; 5 Ins. Law Jour., 67.

55. Where the consideration paid for a policy is single and entire, and the amount of insurance secured thereby, is a gross sum, distributed in specific items upon several pieces of property, the contract is an entirety and indivisible, the sole effect of the apportionment being to limit the extent of the insurer's risk as to each item.

5 Pars. Cont., 5th ed., 519; *Gottzman vs. Penn Ins. Co., 56 Pa. St., 210; Friesmuth vs. A. M. F. Ins. Co., 10 Cush., 587; Brown vs. P. M. Ins. Co., 11 Cush., 280; Lee vs. How. Ins. Co., 3 Gray, 583; Kimball vs. How. Ins. Co., 8 Gray, 33; Lovejoy vs. Augusta Ins. Co., 45 Me., 472; Richardson vs. Maine Ins. Co., 46 Me., 394; Gould vs. York M. F. Ins. Co., 47 Me., 403; Barnes vs. Union M. F. Ins. Co., 51 Me., 110; Day vs. Charter Oak Ins. Co., 51 Me., 91.*

The policy provided, that if the property was mortgaged without notice, the liability of the company should cease. *Held*, that a mortgage of any portion of the property, without notice, avoided the insurance as to the whole.

Savage vs. How. Ins. Co., 52 N. Y., 502, and authorities cited, supra; Langdon vs. Appellants, Minn. S. C., April Term, 1875.

Plath vs. Minn. F. Mut. F. Ins. Assoc'n, Minn. S. C., 23 Minn., 477; 6 Ins. Law Jour., 595.

56. Books lost through removal from vault in order to save them, during the great fire at Chicago, being left in the office in the confusion and excitement, were within the policy insuring books in the vault. Their loss was not negligence.

Chase vs. N. B. & M. Ins. Co., U. S. C. C., III.

57. The policy covered five thousand dollars for the term of one year on his merchandise, hazardous or not hazardous, and on his machinery, tools and fixtures, contained in the five-story brick building, occupied by him as a tobacco factory and warehouse, Nos. 19 and 21, situated on west side of Hammond Street, between Third and Fourth Streets, Cincinnati, adding that the

premises were heated by a furnace in the cellar, and connected with the building by wooden bridges from the upper story. The question was, whether the policy covered the property lost, which consisted of tobacco situated in the fifth story of a building on Main Street, which was used by the plaintiff in connection with a five-story brick building, fronting on Hammond Street, the connection being by wooden bridges across an area. Defendant denied that it insured any property of the plaintiff at any other place than at Nos. 19 and 21 Hammond Street, and denied any loss of the property insured under its policy. It was admitted that it could be proved that when the policy of insurance was obtained, the tobacco in the fifth story of the Main Street building was shown to the agent of the defendant as part of the subject of insurance, and that a surveyor on behalf of the defendant examined it all, including that in the fifth story of the building on Main Street, which was occupied as part of the factory and warehouse by the insured, and that the said fifth story was used entirely and exclusively in connection with the said five-story building as a part of said factory and warehouse, and was accessible only by and through its connection with said five-story brick building fronting on Hammond Street. *Held*, that the plaintiff should not be made to suffer loss of his insurance by reason of failing to show a mutual mistake in a suit for reformation of contract; that the intent of the policy evidently was, to cover the tobacco in the fifth story of the building fronting on Main Street, which was described in the policy as being connected with the five-story brick building fronting on Hammond Street by wooden bridges. Parol evidence was admissible to show that a room, connected by the wooden bridges with the main building, and used as part of the tobacco factory, was included in the premises described.

Harris vs. Aetna Ins. Co., Sup. C. of Cincinnati, 4 Ins. Law Jour., 799.

58. The application was made to the agent of the R. and W. companies, who had authority to issue policies of the first, but only temporarily bind the second. The agent placed the risk in the R. company. On the following morning the R.

company ordered the policy canceled. The risk burned that night. On the next morning the agent, ignorant of the fire, ordered his clerk to bind the insurance in the W. company. Meanwhile the agent of the insured, knowing of the fire, had received the R. policy from the clerk. Subsequently the W. policy was forwarded by that company to the agent, and tendered to the insured in place of the R. policy, but declined. *Held*, that the agent had the option of placing in either company at first, but having once placed the insurance and bound the R. company, his authority was exhausted. He had no right, so long as that contract was binding, to substitute another. *Held*, that the insured not having been notified of the cancellation, as required by the R. policy, it was binding at the time of loss, and the W. policy being only intended to take effect on the termination of the R. policy, had not attached.

Massasoit Steam Mills Co. vs. Western Assur. Co., Mass. S. J. C., 125 *Mass.*, 110; 7 *Ins. Law Jour.*, 750.

59. The policy was issued to F. and B. It contained the following provision: "Loss, if any, first payable to F., as his interest may appear." The contract was made between the insured and F.; he paid the premium, and the insurance was made solely for his benefit. *Held*, that the party to whom the policy is made payable in case of loss, and who pays the premium, is the proper party to sue on the policy.

Insurance Co. vs. Chase, 5 Wal., 509; *Motley vs. Manufacturers' Ins. Co.*, 29 Me., 337; *Chamberlain vs. N. H. Fire Ins. Co.*, 55 N. H., 249; *Jefferson Ins. Co. vs. Cotheal*, 7 Wend., 73; *Pratt vs. N. Y. Central Ins. Co.*, 64 Barb., 589. Case distinguished of *St. Paul F. and M. Ins. Co. vs. Johnson*, 77 Ill., 598.

The policy provided: "If the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon, this policy shall be void." B. had another policy on the property. F. held a mortgage on the property insured, executed by B. *Held*, that the mortgagor and mortgagee each had an insurable interest perfectly distinct and independent, and each had a right to insure independently.

Honore vs. Lamar Fire Ins. Co., 51 Ill., 409.

B. had no interest in the policy of F., to constitute a double

insurance; the two policies must not only be for the benefit of the same person, and on the same subject, but for the same entire risk.

Pitney vs. Glens Falls Ins. Co., 61 Barb., 335; *Tyler vs. Ætna Ins. Co.*, 12 Wend., 515; *Tuck vs. Ins. Co.*, 56 N. H., 326; *Wells vs. Phila. Ins. Co.*, 9 Serg. & Rawle, 103; *Woodbury vs. Charter Oak Ins. Co.*, 31 Conn., 318; *Columbia Ins. Co. vs. Lynch*, 11 Johns., 233.

Westchester F. Ins. Co. vs. Foster, Ill. S. C., 90 Ill., 12; 8 *Ins. Law Jour.*, 596.

60. Insurance on a paper mill, consisting of three separate buildings, all inclosed and connected by steam power, covers all the buildings, and not simply the main building.

Rouke & Co. vs. Middlesex F. Office, Manchester (Eng.) Assizes.

61. Plaintiffs, shipowners, had chartered a ship to be loaded at Batavia, in Java, the charter containing the usual clause that the charterers' agents there might make advances to the captain for the necessary disbursements, to be paid out of the freight. The plaintiffs effected insurances in various offices in London, on freight, to the amount of £5,500, the freight being "valued" at that amount. The agents at Batavia effected a policy for £500 to cover their disbursements, and the charterers, for some reason not clearly explained, effected a policy there, in the North China Company's office, for £5,900 on freight "valued" at that amount. In point of fact, the freight amounted to about £5,760, but deducting the sum advanced to the captain out of freight, would reduce it to a little less than £5,500, the amount of the plaintiff's policy. The ship was lost, and the agents' policy for disbursements was paid, and the plaintiffs claimed under their policy, and their claim was settled at £5,500. The insurers taking an assignment of all claims under the North China policy, *Held*, the North China policy was effected for the benefit of the shipowner, and could be ratified, even after a loss. *Held*, that the freight insured having been satisfied, the plaintiffs could recover nothing under the North China policy on their own account, nor in behalf of the London underwriters, whose claim that they were entitled to contribution, was inconsistent with their alleged pur-

chase of the policy. *Held*, that while a valued policy may not be opened as to the value, it may be to ascertain the thing insured.

Williamson et al. vs. North China Ins. Co., Eng. C. P., L. R., 1 C. P. D., 757.

62. Insured secured a renewal of the policy, concealing the fact of a loss subsequent to the expiration of the first. *Held*, that the policy was void, and the insured was not aided by an alleged verbal agreement to renew prior to the loss.

Merch. Mut. Ins. Co. vs. Lyman, U. S. S. C., 2 Ins. Law Jour., 515.

63. Renewals, although amounting to a new contract, in no way change the terms and conditions of the policy, except as they continue it in force. The rights of the parties are to be determined by the original instrument.

Aurora F. & M. Ins. Co. vs. Kranich, Mich. S. C., 36 Mich., 289 ; 6 Ins. Law Jour., 676.

64. There was evidence that the plaintiff applied for a renewal of her policy as mortgagee, with \$500 additional insurance to cover an additional loan, which the company said they would consider, and a minute was made. An entry was made by an officer noting a renewal, and a new policy was issued which provided for a subrogation of the company to the rights of the mortgagee ; also that the loss should not be payable until such portion of the debt should be enforced as could be collected out of the original security to which this policy was to be held as collateral. This policy was several times renewed. No stipulations existed in the original policy. The premiums were paid by the mortgagors, with an understanding that the insurance was to inure to their benefit. The provision in the second policy was not noticed until after the loss. *Held*, that the evidence justified a finding of an agreement to renew the original policy. *Held*, in action for a reformation of the contract, that the subsequent delivery of the policy, in ostensible compliance with the request, without notice, of a change in the terms, was a virtual renewal. *Held*, that the first policy insured to the benefit of the mortgagor, while the second was a simple insurer of the debt, and a contract

of questionable propriety. *Held*, that the alteration of the contract was an act of bad faith, or a mistake, which equity will correct. *Held*, that the failure of the insured to discover the change, made relief discretionary; but in the case of insurance contracts, such critical examinations are not to be expected, and their omission need not prevent relief. *Held*, that the case is not altered by the fact that defendant might have inserted the same conditions in the original contract had it so elected. *Held*, that under an agreement to renew, defendant had no right to change the terms without notice or consent. *Held*, that defendant cannot take advantage of a condition whose performance it has prevented, and the limitation clause is not available as a defense. *Held*, that the limitation clause must be construed to run from the time the liability to pay commences, and not from the time of the fire.

Citing *Kernochan vs. Bowery Fire Ins. Co.*, 17 N. Y., 428; *Excelsior Ins. Co. vs. Royal Ins. Co.*, 55 N. Y., 343; *Welles vs. Yates*, 44 N. Y., 525; *Rider vs. Howell*, 28 N. Y., 310, and cases cited; *Ames vs. N. Y. Union Ins. Co.*, 14 N. Y., 253-264; *Broom's Maxims*, 657; *Mayor vs. Hamilton Fire Ins. Co.*, 39 N. Y., 46.

Hay vs. Star F. Ins. Co., N. Y. C. A., 77 N. Y., 235; 8 *Ins. Law Jour.*, 633.

65. Where there was evidence tending to show that the agent had consented to a removal of the property and the renewal of the policy on the property as so removed, and a memorandum was on the agent's books purporting to be a new insurance from the time of removal, which was claimed by him to be a mere memorandum, and there had been no return of premium for the unexpired time, the jury had a right to find that there had been an absolute representation of insurance and an agreement to that effect. There is no rule of law outside the statute of frauds which prevents contracts from being changed by parol, or which requires insurance contracts to be in writing.

Westchester F. Ins. Co. vs. Earle, 33 Mich., 133.

Roger Williams Ins. Co. vs. Carrington, Mich. S. C., 9 *Ins. Law Jour.*, 577.

66. Where an insurance company accepts an application to renew a fire insurance policy, and issues the renewal without the

payment of the premium, but upon the representation of the agent that assured is perfectly good, and forwards it to the agent, holding him (the agent) responsible for the premium, it amounts to a contract to insure between the company and the insured. R. insured his building in the Planters' Insurance Company for one year. About the time it expired he called on the agent to renew his insurance for another year. Not having the money with him, but being considered perfectly good for it, the agent accepted the application and forwarded it to the company, stating the facts. The company accepted the application, issued the renewal and forwarded it to the agent, stating to him that they would hold him (the agent) responsible for the premium. *Held*, that this amounted to a contract between the company and R. to insure his property according to the terms and stipulations of the renewal.

Planters' Ins. Co. vs. Ray, Miss. S. C., 52 Miss., 325.

ACTIONS ON.

67. A contract of fire insurance, in the ordinary form, and without a seal, not being a contract by the company to pay a fixed and definite amount of money, but to pay the actual estimated value of the property destroyed or injured, is not one of the instruments described in section 3162 of the Code, and an appeal by the company upon a bond for costs and damages was properly granted.

Imperial Fire Ins. Co. vs. Van, Tenn. S. C., 5 Ins. Law Jour., 470.

68. The insurance contemplated by a correspondence was by a policy to be issued and sent to the agent for delivery, upon the payment of premium. The agent notified the insured of its receipt, and held it until a few days before the fire, when it was canceled for non-payment of premium. *Held*, that no action for recovery will lie.

Myers vs. Liverpool, London, and Globe Ins. Co., Mass. S. J. C., 121 Mass., 338; 6 Ins. Law Jour., 440.

69. If there was no fraud in obtaining the policy, the company cannot rescind the contract of insurance after the loss occurred, on account of an intention to cause the fire. For this to be a ground for rescission, the policy must be declared void before the fire occurs. Such fact, if proved, however, constitutes a complete defense to an action on the policy.

Imperial Fire Ins. Co. vs. Gunning, Ill. S. C., 81 Ill., 236; 7 Ins. Law Jour., 741.

70. The general agent was informed that the property was leasehold, but through a mistake failed to describe it in the policy, as required by its terms. The error was not discovered until after the loss. *Held*, that the company was estopped to set up the error of the agent in avoidance of liability. *Held*, that in such case a court of equity will reform the policy to conform to the intention of the parties, and decree payment.

Insurance Company vs. Wilkinson, 3 Wall., 222; Insurance Company vs. Mahone, 21 Wall., 152; Savings Bank vs. Charter Oak Company, 31 Conn., 51; Rowley vs. Empire Insurance Company, 36 N. Y., 550; Columbia Insurance Company vs. Cooper, 50 Penn., 331; Masters vs. Madison Insurance Company, 11 Barb., 624; Beck vs. New London Insurance Company, 22 Conn., 575.

Ben Franklin Ins. Co. vs. Gillett, Md. C. A., 9 Ins. Law Jour., 774.

71. The plaintiff attached to and filed with his petition, and as part thereof, a copy of the policy of insurance on which his action was founded. On the trial in the Common Pleas and on error to the District Court, the copy of the policy was treated as part of the petition without objection by either party. *Held*, that it is not error in a reviewing court to treat said policy as part of the petition.

Crawford vs. Satterfield, 27 Ohio St., 421.

When in a policy of insurance the written application is referred to, and expressly made part of the contract, such application thereby becomes part of the same as fully as if embodied in the policy.

Byers vs. Farm. Ins. Co., O. S. C., 35 O., 606; 9 Ins. Law Jour., 742.

72. Where, through an error, the agent failed to correctly de-

scribe the property in the policy : *Held*, that the case is peculiarly within the jurisdiction of a Court of Equity to reform the contract, and the fact that payment might have been enforced in an action at law, is no answer to the exercise of such jurisdiction.

Delaware State F. & M. Ins. Co. vs. Gillett, Md. C. A., 9 Ins. Law Jour., 735.

GENERALLY.

73. The action was on a policy of insurance for £3,200 on freight to be carried by the plaintiff's vessel. The proposal or "slip" was signed for the company on the 11th of March, 1871. On the 16th the vessel was lost, and next day—the 17th—the plaintiff heard of the loss and sent his clerk to the company's office for the policy, without telling him of the loss. The company asked what insurance, if any, had been effected on the ship. The clerk said the insurance was only to the amount of £2,700, and the company's manager proposed that a warranty to that effect should be inserted in the policy as it was. It was then found that there was a further insurance on the vessel for £500, but which would expire on the 20th of March, and the warranty was altered accordingly, "No insurance on the vessel after the 20th of March beyond £2,700." The company then found out the fact of the loss, and they disputed the claim on the ground that the fact had been concealed. The plaintiff relied on a recent decision in the Court of Queen's Bench, *Cory vs. Paton*, to the effect that there need not be a disclosure of such a fact after the "slip" was signed. The company, however, insisted that the first proposal was varied and a new one agreed to with the warranty, and that the concealment of the fact of the loss was material with reference to their acceptance of that second proposal. *Held*, that if there was a "slip" made out, and afterward a policy was executed, nothing which happened between the time of the "slip" and of the policy, was material to be communicated. It was said, however, that if, when the underwriter was asked to give out the policy, he had some words inserted in it for his own advantage, this gave him a right to ask for some further disclosures. But that would be a singular result. The policy must relate back to

the original agreement, and the final terms must be considered as those originally intended. Dealing with the matter on the basis, not of mere form, but of substantial principle, the decision in *Cory vs. Paton* was applicable to the present case.

Lisheman vs. Northern Maritime Ins. Co., Eng. Ex. Ch., 4 Ins. Law Jour., 394.

74. Inability to read a policy, through ignorance of the English language, is no excuse for ignorance of its terms, and the insured cannot be heard to complain that his ignorance misled him.

Fuller vs. Madison Mut. Ins. Co., Wis. S. C., 36 Wis., 599; 4 Ins. Law Jour., 841.

75. The policy was originally made to the plaintiff by the defendant through an insurance agent, P. Afterward P. returned the policy to the defendant with a request to make it payable to K., the mortgagee. It was claimed that this change was made without authority of the plaintiff, that the policy came into the possession of K. by mistake, and that after K. had retained the policy seven months, and the premises had been destroyed by fire, then for the first time plaintiff knew of the change in the policy. *Held*, that the question should have been submitted to the jury whether there had been any authority or consent by the plaintiff for the change in the policy, and also whether the retention of the new policy by K. for seven months did not have some tendency to show that the plaintiff consented to the alleged new arrangement. *Held*, that as a matter of law the retention of the policy by K. did not constitute an acceptance on the part of the plaintiff of the alleged cancellation.

Bennett vs. City Fire Ins. Co., Mass. S. J. C., 4 Ins. Law Jour., 109.

76. The fact that a policy is written does not prevent its subsequent change by parol.

Sanborn vs. Firemen's Ins. Co., 16 Gray, 443; Kelly vs. Conn. Ins. Co., 10 Bosw., 82; Audubon vs. Excelsior Ins. Co., 27 N. Y., 216; Baxter vs. Massachusetts Ins. Co., 13 Allen, 320; Kennebeck Co. vs. Augusta Ins. Co., 3 Gray, 209; Trustees 1st Baptist Church vs. Brooklyn Fire Ins. Co., 19 N. Y., 305.

A written bargain is of no higher degree than an oral one.

There can be no more force in an agreement in writing not to agree by parol, than in a parol agreement not to agree in writing. Every such bargain is ended by the one which contradicts it.

Pechner vs. Phoenix Ins. Co., N. Y. C. A., 1875.

Westchester Fire Ins. Co. vs. Earle & Reynolds, Mich. S. C., 33 Mich., 14; 5 Ins. Law Jour., 651.

77. Where the agent held the policy under agreement with the assured to deliver it to the mortgagee when called for, this was sufficient delivery of the policy, though it had not been actually called for.

Home Ins. Co. vs. Curtis, Mich. S. C., 52 Mich., 402; 5 Ins. Law Jour., 120.

78. The conditions annexed to a policy and made a part thereof by a provision in the instrument, relative to inflammables, in order to bind the insured, must be brought to his notice at or before contracting. A policy provision making the agent of the company the agent of the insured, is ineffectual. Whether certain classes of goods were "dry goods" within the policy is a question of fact for the jury.

Bassell vs. Amer. F. Ins. Co., U. S. C. C. Va., 2 Hughes, 531.

79. A lease of land to a third party, is not a violation of a policy provision requiring buildings on leased ground, or title less than sole ownership, to be made known.

Ins. Co. vs. Haven, U. S. S. C., 5 Otto, 242.

80. An open canal policy provided that the loss should be estimated according to the cash value of the property at the place of destination, freight to place of destination to be deducted, and that insurers would pay such proportion of the loss as the amount insured bears to sound value of property: Also, that the insurer would make good all such loss, etc., not exceeding in amount the sum insured, etc. *Held*, that the clauses had no reference to the existence of other insurance, and where the policy was alone, and the insurance \$8,000 on goods worth \$20,000, and the loss \$9,378, the liability was two-fifths of the loss and not of \$8,000.

Breed vs. Prov. Wash. Ins. Co., U. S. C. C., E. D. N. Y., 17 Blatch., 287.

81. A temporary non-compliance with the conditions of the policy where there is compliance at the time of loss, does not work a forfeiture.

Organ vs. Hibernia Ins. Co., St. Louis (Mo.) C. A.

82. L. insured for one month, taking a receipt which stated that the insurance was subject to the conditions contained in the ordinary policies of the company. L. requested a policy, but was informed that it was not usual to issue them for short terms. *Held*, that the insured was not bound by a condition in the ordinary policies which he had never seen, requiring notice and indorsement of consent to subsequent insurance.

Lafleur et al. vs. Citizens' Ins. Co., Court of Q. B., Montreal, 8 Ins. Law Jour., 79.

See Cross Index for other cases bearing on POLICY.

PORTWORTHY.

DIGEST OF RECENT CASES.

1. The vessel was tipped in order to repair a suspected injury to the rudder while in port, and as a result was capsized by the wind. *Held*, that the accident was the result of those in charge of the vessel, not of unportworthiness, and as the policy insured against barratry, it was liable.

Cross vs. Brit. Am. Ins. Co., Montreal Q. B.

See Cross Index for other cases bearing on PORTWORTHY.

PRACTICE.

DIGEST OF RECENT CASES.

1. Where in conflicting testimony, the court charged that the policy is void unless the property is worth the sum stated in the application, also that the insured could not recover unless the

owner of the ground, also that if the statement concerning the thickness of a wall was untrue no recovery could be had, a finding by the jury for the insured was conclusive on all these disputed issues, and cannot be disturbed by an appellate court. Where the question of incendiarism by the insured was litigated during the trial, and submitted to the jury on an issue of fact, an appellate court will not disturb the verdict. Where the value of property was trifling, and there was no proof that it could have been injured by the fire, a refusal of the court to instruct concerning a policy clause requiring the property to be put into the best possible shape after a fire, was no error.

Wright vs. Hartford Fire Ins. Co., Wis. S. C., 36 Wis., 522; 4 Ins. Law Jour., 251.

2. Under section 91 of the criminal code of Ohio, a variance, on the trial of arson cases, between the allegations of the indictment descriptive of the insurer of such building, and the proof given in support thereof, unless such variance is found to be material to the merits of the case, or to have the effect to prejudice the accused, does not entitle him to an acquittal. The mere fact that leading questions are improperly allowed on the examination of a witness, although allowed as of right, is not error for which the judgment will be reversed.

Evans vs. State of Ohio, Ohio S. C., 4 Ins. Law Jour., 204.

3. Where there is conflicting evidence it is the province of the jury to decide upon its weight and credibility, and the court will not set aside the verdict, because it disagrees in opinion with the jury.

Ashley vs. Ashley, 2 Str., 1142; Swain vs. Hall, 3 Wils., 45; Lewis vs. Peake, 7 Taunt., 153; Hartwright vs. Badburn, 11 Price, 323; Carstairs vs. Stein, 4 Maule & Selwyn, 192; Woodward vs. Payne, 15 Johns., 493; Ewing vs. Burnet, 11 Pet., 41; States vs. Lamb, 12 Pet., 1; Richardson vs. Roston, 19 How., 263; Hyde vs. Stone, 20 How., 170.

When the jury have assessed the amount of loss at a certain figure, it is not competent for the court to inquire how the estimation has been made, so long as a substantially just result has been reached.

Bayly and Pond vs. London and Lancashire Ins. Co., U. S. C. C., 4 Ins. Law Jour., 503.

4. The court permitted plaintiff to amend his complaint by setting forth the application, and making it a part thereof. Immediately on amending, the plaintiff submitted his case to the jury. Before the complaint was amended, the plaintiff testified to his compliance with the policy conditions. *Held*, that the legal effect of the amendment was the same as if the application had been set out in the complaint, when it was originally filed; and the fact that the evidence of compliance with the policy conditions was offered before, and not after the amendment, did not affect its validity. The property was not fully insured. The jury found the value of the store to be \$700, as stated in the application; also, that the loss was \$3,062; of which \$462 was the value of the store, and \$2,600 the value of the stock. *Held*, that the finding should be read, \$462 is the damage on account of the destruction of the store, and \$2,600 is the damage on account of the destruction of stock.

Wynne vs. Liverpool and London and Globe Ins. Co., N. C. S. C., 71 N. C., 121; 4 Ins. Law Jour., 348.

5. Where the court erroneously instructed that an actual total loss can be claimed without abandonment if the cost of repairs was excessive, and the jury may have assessed damages on this false principle, although they found that the vessel remained *in specie* and was repaired by the insured, the judgment will be reversed.

Globe Ins. Co. vs. Sherlock, Ohio S. C., 25 O., 50; 4 Ins. Law Jour., 515.

6. Where there has been no request to find as to the fact of a breach of warranty, and no exception to a refusal so to find, a court of review will not look into the evidence to reverse a judgment.

Smith vs. Glens Falls Ins. Co., N. Y. C. A., 62 N. Y., 85; 4 Ins. Law Jour., 708.

7. A creditor coming in before a master, appointed under a decree by the court, to take proof of claim against a bankrupt company, and having a claim disallowed on exceptions to the master's report in the court below, may appeal from the order

disallowing the exceptions, though he was not actually a party to the record.

Barbour's Chancery Practice, v. 1, pp. 382; *Strike vs. McDonald*, 2 Harr. & Gill, 191.

Plaintiff's claim was disallowed because it had been assigned to an officer of a company reinsuring the bankrupt. It appearing that the assignment was induced by misrepresentation of officers of both companies, and that assignee was acting merely in the interest of his company; *Held*, that plaintiff should have made the assignee a party by petition, but not having done so, assignee should have been brought into court, if deemed a necessary party, instead of dismissing the complaint.

Derrick vs. Lamar Ins. Co., Ill. S. C., 5 Ins. Law Jour., 42.

8. The rule in the court below requires that where a company relies in whole or in part on a breach of warranty not contained in the policy, but set forth in any other paper or instrument in the hands of the insurer, the notice under the general issue shall set forth the same, and indicate the breach relied on. *Held*, where the application was made a condition of insurance and a warranty, breach of warranty was not admissible as a defense where the company simply pleaded the general issue, even though evidence introduced by plaintiff, as part of his case, showed such breach.

Peoria Ins. Co. vs. Perkins, 16 Mich., 380.

Where a petition and bond for removal to the United States Court was filed, but no farther steps taken, and the parties afterward went to trial on the merits, without questioning the jurisdiction, the right of removal was waived.

Horne Ins. Co. vs. Curtis, Mich. S. C., 32 Mich., 402; 5 Ins. Law Jour., 120.

9. Refusal to instruct a jury to find specifically the value of an insured valued cargo, from supposed want of power to do so, would be error, but if because the exigencies of the case did not seem to require it, it would not be error. Where the court said "it would do so with consent of counsel for plaintiff, but could

not without," an appellate court will not so interpret as to adjudge error.

Sturm vs. Atlantic Mut. Ins. Co., N. Y. C. A., 63 N. Y., 78; 5 Ins. Law Jour., 209.

10. Where the court at circuit, nonsuits the plaintiff on the whole case, who excepts thereto, he is not required to ask specifically to go to the jury on the whole case, or any part of it, to enable him to present his exceptions to a court of review.

Train vs. Holland Purchase Ins. Co., N. Y. C. A., 62 N. Y., 578; 5 Ins. Law Jour., 177.

11. It did not appear from the record whether or not the policy had been filed with the declaration, but the company had not called for its production, and had not been prejudiced by the omission. *Held*, that it was too late to object for the first time in the Supreme Appellate Court of Va., that it had not been filed with the declaration. Proof of the waiver of any policy condition is equivalent to proof of its performance, under a declaration alleging such performance. Where the declaration alleges compliance with all the conditions of the policy, it means such as were not waived, and proof of waiver is admissible, though the English rule is different.

Va. act of 1871-2, ch. 79, sec. 1, p. 58; Code, ch. 36, sec. 44, p. 372; 4 Rob. Pr., 443; 2 Smith's Leading Cases, Wallace's notes, p. 74 and cases cited; *Ketchum vs. Protection Ins. Co., 1 Allen, N. B., 136; Lycoming Ins. Co. Schollenburger, 44 Pa. St. R., 257; 5 Rob. Pr., 252; 1 Greenl., sec. 2.*

West Rockingham Mut. Fire Ins. Co. vs. Sheets & Co., Va. S.C.A., 5 Ins. Law Jour., 910.

12. Where the evidence would have warranted the jury in finding for the plaintiff on the whole issue, and the court was not called upon to submit any question of fact to the jury, but was called upon by defendant to decide the case as a question of law, the finding of the facts by the court is not a ground of exception.

Marine Bank vs. Clement, 31 N. Y., 43; Maloney vs. Tioga Co. R. R., 3 Keyes, 356.

McCall vs. Sun Mut. Ins. Co., N. Y. C. A., 66 N. Y., 505; 6 Ins. Law Jour., 56.

13. Offers of proof should be distinct and clear, and should embody the facts in such connection and terms as to be ruled in their intended sense, and be examined and applied in the appellate court in the proper light to test the accuracy of the ruling.

Clay F. & M. Ins. Co. vs. Huron Salt, etc., Co., 31 Mich., 346, 356.

A ruling, if correct when applied to a proposition as it appeared, cannot be questioned on appeal on the ground that the proposition covered some meaning which required a different ruling.

Daniels vs. Patterson, 3 Cow., 47; *Elwell vs. Dodge*, 33 Barb., 336; *First Bap. Ch. vs. Brooklyn F. Ins. Co.*, 23 How. Pr., 448; *Johnson vs. Carneley*, 6 Seld., 570, 575, 576; *Pepin vs. Lachenmeyer*, 45 N. Y., 27; *Harger vs. Edmonds*, 4 Barb., 256; *Van Buren vs. Wells*, 12 Wend., 203; *Hosley vs. Black*, 28 N. Y., 438; *Wheeler vs. Rice*, 8 Cush., 205; *Wheeler vs. Farmers' Bk. of Lancaster*, 11 Sarg. Rep., 134; *Wright vs. De Groff*, 14 Mich., 164; *Gilbert vs. Kennedy*, 22 Mich., 117; *Albright vs. Cobb*, 30 Mich., 362.

Where an offer of proof that the insurance company by receiving the premium had ratified the unauthorized contract with its agent, was couched in terms so ambiguous, when taken in connection with the previous evidence and rulings, that the judge was led to suppose it was intended merely to prove what had already properly been excluded concerning the dealing of the agent with the insured, its exclusion was not error. A ruling consented to at the trial cannot be afterward questioned.

Morrish vs. Murray, 13 Mees. & Wels., 52; *Boeklen vs. Hardenburg*, 60 N. Y., 2.

Reynolds vs. Continental Ins. Co., *Mich. S. C.*, 33 Mich., 13; 6 *Ins. Law Jour.*, 569.

14. The findings of fact by U. S. courts belong as fully to the record as do the verdicts of a jury, whether general or special, and no bill of exceptions is necessary to bring them upon the record.

13 St. at Large, 500, sections 649 and 700 Rev. Stats.

The court had power at a subsequent term, by an order, to correct the record by incorporating into it, *nunc pro tunc*, a special finding of the facts upon which the judgment had been rendered, it being but an amendment of form and not of substance, and there being enough to amend by.

Rhodes vs. Commonwealth, 35 Penn. St., 276; Matheson's Ad'r vs. Grant's Ad'r, 2 How., 282.

Ætna Ins. Co. vs. Boon et al., U. S. S. C., 6 Ins. Law Jour., 933.

15. Questions raised on review grew out of rulings upon the policy, application, and other written instruments, none of which appeared in or were in any way made a part of the printed bill of exceptions. *Held*, that the plaintiff in error will not be presumed to be injured by rulings upon instruments which are not shown, and whose contents cannot be ascertained by the court.

State Ins. Co. vs. Reynolds, Mich. S. C., 6 Ins. Law Jour., 16.

16. In assumpsit the defendant pleaded an agreement to accept and an acceptance by plaintiff of a sum in full satisfaction of loss. Plaintiff contended that the agreement was obtained by fraud. *Held*, that the action was not maintainable without a tender back of the sum paid by defendants.

Bisbee vs. Ham, 47 Me., 543.

Potter vs. Monmouth Mut. F. Ins. Co., Me. S. J. C., 4 Ins. Law Jour., 463.

17. The state agent took the sworn statement of the insured in respect to various matters supposed to be material to the loss, and also those of two other parties concerning facts bearing on the company's liability, but the statements did not embrace all the material facts required by the policy in the proofs of loss, and the agent testified that he distinctly told the insured that they were not intended to waive such proofs, blank forms of which were in the hands of the local agent, who would aid him if he desired in filling them up. *Held*, that there had been no waiver of the proofs, and it was error to submit the question to a jury.

Ins. Co. of N. A. vs. Bainbridge, Ky. C. A., 7 Ins. Law Jour., 772.

18. A court can exercise a sound discretion in controlling the examination of witnesses; therefore it was not error to stop a cross-examination of sixty-five minutes relating to trivial matters.

Monroe Co. Mut. Ins. Co. vs. Robinson, Pa. S. C., 7 Ins. Law Jour., 636.

19. A multiplicity of suits against the company may be consolidated where the same question of law is concerned, and one action be sufficient. Or a defense can first be established at law, and then equity invoked to prevent further vexatious litigation; but the first remedy is at law, and a court of equity will not interfere if that remedy is adequate.

Gilman vs. Nixon, 26 Ill., 50; *Stahl et al. vs. Webster et al.*, 11 id., 571.

Imperial Fire Ins. Co. vs. Gunning, Ill. S. C., 81 Ill., 236; 7 *Ins. Law Jour.*, 741.

20. When a series of propositions requested as a charge to the jury are given, and there are one or more sound propositions in the series, an exception to the series in this form: "to the giving of which charge defendant at the time excepted," is insufficient. The exception should be to each proposition, or if not intended to except to each, should in some pertinent way distinctly refer to the proposition claimed to be erroneous.

1 Seld., 422.

Where a series of propositions are requested as a charge, and one or more of the propositions are unsound, and the charge is refused or modified in several respects, an exception as follows: "to which refusal and modifications of such charges defendant at the time excepted," is not sufficiently definite. In such case the exception falls because it fails to direct the attention of the reviewing court to the proposition or propositions in regard to which the error is claimed to exist.

3 Otto, 46; 11 N. Y., 416; 6 N. Y., 233; 7 N. Y., 236; 40 N. Y., 556; 47 N. Y., 570; 30 Ohio St., 104; 30 Barb., 246; 45 N. Y., 556.

An exception in the following form: "to which general charge of the court the defendant at the time excepted, and excepted also to each proposition of law therein contained, differing from the several specific charges asked by defendant," when the general charge contains more than one proposition of law, and is not in all respects erroneous, is wanting in definiteness, and fails to present any question with sufficient certainty for review on error.

25 O. S., 584; 47 N. Y., 576; 3 Otto, 46; *Lewis vs. Stockhill*, 30 O. S.; 3 Otto, 291; *P., Ft. W. & C. Railway vs. Probst*, 30 O. S., 104.

An exception to a general charge, or one containing more than a single proposition of law, should clearly point out the part of the charge intended to be questioned by the exception at the time the charge is given or refused, and failing in this respect, the reviewing court will not be bound to take notice of the exception.

Western Ins. Co. vs. Tobin et al., O. S. C. C., 32 O., 77; 7 Ins. Law Jour., 346.

21. When a motion is heard and determined, upon an agreed case and upon affidavits in the court below, without objection, it is too late to raise any preliminary objection to the right of the court to entertain and decide the motion upon such papers after an appeal to this court. A verdict procured upon false testimony concerning the contents of a lost letter, containing proofs of loss, will be set aside at the instance of the aggrieved party, when it satisfactorily appears that such party, through no fault or lack of diligence in the preparation or conduct of the trial, was unprepared and unable to rebut such testimony at the time of the trial, and when it also appears that he has been guilty of no laches in making application for a new trial. In reviewing the order granting a new trial, upon grounds other than the insufficiency of the evidence to support the verdict, its correctness will be presumed, unless the contrary affirmatively appears of record.

Nudd & Co. vs. Home Ins. and Banking Co., Minn. S. C., 7 Ins. Law Jour., 700.

22. The application was made and the policy issued through the local agent of G. County, and service of notice in a suit was made on the agent of another county who had no authority to act for the company in G. County, or employ counsel. The agent testified to having sealed and directed the notice to the company's office, and to the best of his belief, having deposited it in a basket in the office, whence the letters are taken to the post-office. No other intimation was sent to the company; it failed to receive the notice, and judgment against it was entered by default. Petition was made to set aside the judgment, the company claiming to have a meritorious defense. *Held*, that in deciding a petition to set aside a judgment entered by default in Iowa, it is

not necessary to go into the merits of the defense if the grounds for vacating the judgment appear not to be sufficient. *Held*, that under the Iowa statute, and the agreement exacted of the company, service might be lawfully made on any agent in the State. *Held*, that the evidence was not sufficient to warrant a court in setting aside the judgment on the ground of unavoidable casualty or misfortune.

Niagara Ins. Co. vs. Rodecker & Pearson, Iowa S. C., 7 Ins. Law Jour., 824.

23. Where defendant asked the court to dismiss the complaint on the ground that plaintiff had failed to make out a case, thus conceding that there was nothing to submit to a jury, error in not submitting certain facts to the jury which was not requested, cannot be alleged on appeal.

Winchell vs. Hicks, 18 N. Y., 558; Excelsior Fire Ins. Co. vs. Royal Ins. Co., 55 N. Y., 343.

Pelton vs. Westchester F. Ins. Co., N. Y. C. A., 77 N. Y., 605; 8 Ins. Law Jour., 492.

24. If a circular addressed by the company to its policy holders, alleged to state in effect that it will not forfeit policies, is a waiver of the right to insist on a forfeiture, the defense is available in a court of law, and therefore does not furnish proper ground for enjoining the company in equity from setting up the matter in a law action.

Robinson vs. St. Louis Mutual Life Ins. Co., U. S. C. C. Mo., 8 Ins. Law Jour., 159.

25. A party defendant must notify the complainant by his answer of the defense he intends to set up; and in a clear and unambiguous manner, and he cannot be allowed to avail himself of anything not contained in his answer, though the evidence may show it.

1 Daniel, Chy. Practice (Perkin's Ed.), 725-6.

Admissions made in answers to a bill are conclusive, and disproof thereof cannot be allowed.

Weiders vs. Clark, 27 Ill., 251; Fergus vs. Tinkham, 38 Ill., 407; Campbell vs. Benjamin, 69 Ill., 244; Morgan vs. Cerlies, 81 Ill., 72.

Mann, receiver, vs. Meyer, Ill. S. C., 8 Ins. Law Jour., 905.

26. A compulsory nonsuit should not be granted where the evidence, on the most favorable construction for the plaintiff that can be given it, will not justify a verdict in his favor.

Imhoff vs. Ry., 22 Wis., 682; *Sutton vs. Wauwatosa*, 29 Wis., 21.

Schaener vs. Hekla F. Ins. Co., Wis.S.C., 10 *Ins. Law Jour.*, 306.

27. When all the evidence that was offered, or could have been admitted under special pleas, was admitted under the general issue, the ruling of the court sustaining a demurrer to the special pleas, cannot be urged as a ground for reversing a judgment in favor of the plaintiff, as the error, if any, could not have prejudiced the defendant. When the owner of property agrees to give a trust deed to secure money to be loaned to him, and also to insure the property for the further security of the lender, which he does do, and the loan is thereby effected, in a suit by the trustee of the lender, to whom it is agreed in the policy to pay the insurance money, there will be no variance, if it is alleged in the declaration that the trustee paid the premium for this policy.

Hartford F. Ins. vs. Olcott, Ill. S. C.

28. In assumpsit by residents of New Hampshire, on a policy of insurance against fire, issued in this State for the benefit of plaintiffs, on property in this State, by an insurance company that was incorporated and organized under the laws of Massachusetts, and that had complied with the requirements of No. 1, Sts. 1874. The writ was served on one of the insurance commissioners in accordance with section 8 of that statute. *Held*, that the court thereby acquired jurisdiction of defendant, and that it made no difference that plaintiffs resided out of the State.

Osborne vs. Shawmut Ins. Co., Vt. S. C., 51 Vt., 278.

29. Where, by necessary implication, the Appellate Court must, in affirming judgment, have found the fact of ownership as to insured property, the finding will not be reviewed by the Supreme Court. Even if evidence which is admissible is rejected, but its exclusion can have done no harm, the immaterial error will not be a ground of reversal.

Germania F. Ins. Co. vs. McKee, Ill. S. C., 94 Ill., 494; 9 *Ins. Law Jour.*, 350.

30. Upon the trial of this policy, proofs of loss and other papers were read to the jury. When about to retire, counsel for the plaintiff handed one of the jurors a paper, upon which was written items corresponding in amount with the items named in the policy of insurance; *Held*, that where there was evidence of an actual loss by fire, covering the items named in the paper, notwithstanding it was irregularly sent out, it was not cause for a new trial. When the verdict is for a larger amount than the damages laid in the *narr.*, court, on motion, will permit an amendment. The English doctrine of sending out only sealed papers with the jury was never adopted in the Pennsylvania practice.

Foy vs. Ins. Co., C. P. of Luzerne Co., Pa., 5 Ins. Law Jour., 720.

See Cross Index for other cases bearing on PRACTICE.

PREMIUM.

ABSTRACT OF THE LAW.

a. Payment of premium is not necessary to complete the contract, unless so stipulated.

City of Davenport vs. Peoria F. Ins. Co., 17 Iowa, 276 ; Kohn vs. Ins. Co. of N. A., 1 Wash. C. C., 93 ; Hamilton vs. Lycoming Ins. Co., 5 Barr., 389.

b. But when payment is a condition precedent of insurance, no liability attaches, until payment is made, unless the policy has been delivered.

Flint vs. Ohio Ins. Co., 8 Ohio, 501; Buffum vs. Fayette Mutual Ins. Co., 3 Allen, 360.

c. The delivery of the policy, however, usually amounts to a waiver of payment, even when required by its terms, unless it is specially agreed that the contract so delivered, is not to take effect until payment has been made.

Boehm vs. Williamsburg Ins. Co., 33 N. Y., 131 ; Wood vs. Poughkeepsie Ins. Co., 32 N. Y., 619; Sheldon vs. Atlantic F. & M. Ins. Co., 26 N. Y., 460.

d. Authorized representatives of the company, may also waive the stipulation as to prepayment, and reliance upon such waiver by the insured, will estop the company from setting up the condition.

Bodine vs. Exchange F. Ins. Co., 2 Ins. L. J., 23 ; Lycoming Ins. Co. vs. Schollenberger, 8 Wr., 259; Mitchell vs. Lycoming Ins. Co., 1 P. F. Smith, 402; Keenan vs. Dubuque Mutual F. Ins. Co., 18 Iowa, 375; Hallock vs. Com. Ins. Co., 2 Dutch. (N. J.), 268; Sheldon vs. Atlantic Ins. Co., 26 N. Y., 460; Post vs. Aetna Ins. Co., 43 Barb., 351.

e. But the authorities are not agreed whether such payment can be waived in the case of mutual companies, when required by the charter or by-laws.

Hale vs. Mechanics' F. Ins. Co., 6 Gray, 169; *Baxter vs. Chelsea Mutual F. Ins. Co.*, 1 Allen, 294; *Priest vs. Citizens' Mutual Ins. Co.*, 3 Allen, 602.

f. Agreement by the agent to become responsible for the payment, amounts to a waiver of payment as between the company and the insured.

Langstrass vs. German Ins. Co., 48 Mo., 201; *Bouton vs. Ins. Co.*, 25 Conn., 542.

g. An acknowledgment of the payment in the policy, is not necessarily conclusive against the company as to the fact, but may be impeached by evidence.

Sheldon vs. Atlantic Ins. Co., 26 N. Y., 460; *Mitchell vs. Mutual Ins. Co.*, 10 La., 737; *Mulrey vs. Shawmut Mutual F. Ins. Co.*, 4 Allen, 116.

h. The insured is entitled to a return of premium unless the risk has actually begun.

Clark vs. Manufacturers' Ins. Co., 2 Wood & M., 472.

i. But if the policy is void on account of illegality or fraud, no recovery of premium can be had.

Friesmuth vs. Agawam Mutual F. Ins. Co., 10 Cush., 587.

j. Return of premium is a prerequisite to effectual cancellation.

Peoria M. & F. Ins. Co. vs. Botts, 47 Ill., 516; *Ætna Ins. Co. vs. Maguire*, 51 Ill., 342; *Van Valkenberg vs. Lenox F. Ins. Co.*, 51 N. Y., 465.

k. Any form of payment consented to by the insurer or an authorized agent, when the latter acts presumptively in the interest of his principal, is valid payment in the absence of special stipulation to the contrary, unless it be of such character that the payor should know it would not be acceptable to the principal.

N. Y. Cent. Ins. Co. vs. Ins. Co., 20 Barb. (N. Y.), 469; *Tayloe vs. Merch. F. Ins. Co.*, 9 How. (U. S.), 39.

See further on this subject under AGENT, BROKER, CANCELLATION, CONTRACT, PAYMENT, POLICY, PREMIUM NOTE, WAIVER.

DIGEST OF RECENT CASES.

PREMIUM—WHEN NON-PAYMENT FORFEITS THE POLICY.

1. An application for a policy of fire insurance, contained a covenant that in case of loss, the assured would "adjust the same in accordance with the by-laws of the company and the conditions of the policy." The body of the policy contained a condition that the company should not be liable by virtue of the policy "until the premium therefor should be actually paid," and that

“no agent is empowered to waive any of the conditions of this policy either before or after a loss, without special authority in writing from the company.” The premium was not paid, nor the policy delivered when a loss occurred. *Held*, that the plaintiff could not recover, the agent never having been authorized to waive any of the conditions of the policy.

Marland vs. Royal Ins. Co., 21 P. F. Smith, 393. Distinguishing *Mentz vs. Lancaster F. Ins. Co.*, 29 *id.*, 475.

Greene vs. Lycoming F. Ins. Co., Pa. S. C., 9 *Ins. Law Jour.*, 827.

WHEN NON-PAYMENT DOES NOT FORFEIT THE POLICY.

2. Application was accepted and policy made out, but not taken away. After the fire, insured without mentioning the fire, paid the premium and received the policy. *Held*, that the contract was complete, and insured was not bound to speak of the fire.

Baldwin vs. Chouteau Ins. Co., Mo. S. C., 3 *Ins. Law Jour.*, 369.

3. There was evidence that the City Insurance company, instead of relying on the terms of the policy, sent it to the Allemania Insurance Company for delivery, and that the officer of the latter company to whom the policy was committed in charge, so conducted the business and held out the broker, as to induce the insured or her agent to believe that he was authorized to hand over the policy on payment to him. *Held*, that the effect of the evidence was to estop the City Insurance Company from asserting the rule as to payment of the premium against the insured, and to become evidence of a waiver.

City Ins. Co. vs. Zoller, Pa. S. C., 4 *Ins. Law Jour.*, 478.

4. Where the agent, acting for himself, advances the premium and afterward takes the insured's note and negotiates it as his own, this is sufficient compliance with a policy condition requiring prepayment, and the company may not cancel without notifying the insured and returning the premium.

Home Ins. Co. vs. Curtis, Mich. S. C., 32 *Mich.*, 402; 5 *Ins. Law Jour.*, 120.

5. The policy provided that the company should not be liable until the premium was paid. *Held*, that the payment of premium at the time of making the contract is not necessary to bind the company; the agent may waive the condition and give credit.

Angell vs. Hartford Insurance Co., 59 N. Y., 171; (4 Ins. Law Jour., 427); *Bøhm vs. Williamsburg Ins. Co.*, 35 N. Y., 131; *Sheldon vs. Atlantic Ins. Co.* 26 N. Y., 460.

The insured was accustomed to receive policies from the company without payment. There was evidence tending to show an understanding with the secretary that the insurance was renewed, and that the policy had been made out by the secretary, but not delivered. At a subsequent call the plaintiff stated to a clerk, in the absence of the secretary, that he had another policy and would pay for the two together; to which the clerk replied, very well. Payment was not tendered until after the fire, a few days later, when the secretary refused to receive it, alleging no liability on the ground that the house was unoccupied. Payment was subsequently accepted on the other policy from its original date. *Held*, that to rule as a matter of law that there was no waiver was error; there was sufficient evidence for a jury.

Church vs. La Fayette Fire Ins. Co., N. Y. C. A., 66 N. Y., 222; 5 Ins. Law Jour., 581.

6. The policy provided that the premium was payable on delivery, but when a four months credit is given the policy shall be in force during that time; but unless the premium is paid within the four months the company shall not be liable for a subsequent loss; also, that if no loss had occurred payment after the four months would render the insurance valid. The policy was delivered by the agent with no demand for immediate payment. Agent had no authority to waive its conditions. The property burned after the expiration of the four months, the premium being still unpaid. In a similar contract between the parties a short time before, the premium was paid to the agent more than four months after the delivery, and no objection was raised by the company as to the validity of the policy. *Held*, that the delivery without demanding payment did not, by itself, definitely fix the term of credit at four months, or any other period. *Held*, that

there was ground for a jury to find that the policy condition requiring payment within four months was waived.

Bowman vs. Agricultural Ins. Co., N. Y. C. A., 59 N. Y., 521; 5 Ins. Law Jour., 9.

7. The policy provided that the company should not be liable until the premium should be actually paid to the company. An agent having the conceded authority, waived prepayment. Payment was subsequently demanded from time to time before the fire. The policy was not canceled, and the insured was not notified that it would be at any time. *Held*, that the waiver continued to date of the fire, and the company was liable.

Washoe Tool Manuf. Co. vs. Hibernia Fire Ins. Co., N. Y. C. A., 66 N. Y., 613; 5 Ins. Law Jour., 773.

8. The policy provided that the company should not be liable until the premium was actually paid. It recited that it was issued in consideration of the receipt of \$60. The policy was procured by an insurance agent, M., not the agent of the company, through R., the secretary of another company, and was sent through them to the insured. The premium was not paid at the time, but a note was afterward taken of the insured by M., which was not paid at maturity, nor till after the loss, when the balance of the premium, deducting M.'s fee, was tendered to the company, and refused. *Held*, that the payment of premium was waived by the delivery of the policy.

Wood vs. Poughkeepsie Ins. Co., 32 N. Y., 619; Sheldon vs. Atlantic F. Ins. Co., 26 N. Y., 460; Boehm vs. Williamsburg Ins. Co., 35 N. Y., 131; Miller vs. Life Ins. Co., 12 Watts, 303.

Eagan vs. Aetna F. & M. Ins. Co., W. Va. S. C. A., 10 W. Va., 583; 6 Ins. Law Jour., 832.

9. The insured applied for insurance, stating that he was not ready to pay the premium. The agent replied that the rules of his company forbade him to waive payment of premium except in writing. Subsequently he informed insured that he had made a policy, not stating in what company, and the insured did not know until after the loss, nor did he pay the premium, nor was the loss reported. *Held*, that the policy provision authorizing a

written waiver, implied power to verbally waive, and the company was liable for the acts of its agent.

Warner vs. Htfd. F. Ins. Co., Iowa S. C.

10. Where the defendants answered that they had issued the policy of insurance sued upon, at the instance of Bader, agent of the plaintiff; that when called upon to pay the premium, he referred them to plaintiff, who declined paying, on the ground that her agent must have paid it; that, afterward calling upon Bader, and informing him of the failure of plaintiff to make payment, he advised them to cancel the policy, which they accordingly did, wherefore, they were no longer bound. *Held*, that where a policy of insurance is issued without prepayment of the premium, the inference is that the insurers intended to extend a credit for its payment; that it was not at the option of the company to cancel the policy; that they only had a right to claim a dissolution of the contract for non-payment of the premium upon putting the other party *in mora*; that Bader was only empowered to apply for the renewal of the policy, and was without instructions or authority to consent to its annulment.

Latroix vs. Germania Ins. Co., La. S. C., 27 La., 113.

11. The policy provided that the company should not be liable until actual payment of premium, and nothing should be deemed a waiver less than an express indorsement on the policy. *Held*, that where the company charged the broker who obtained the policy with the premium with his knowledge, it was liable.

Bang vs. Farmville Bank & Ins. Co., U. S. C. C. Va., 1 Hughes, 290.

12. Payment of premium by the agent, giving credit to the insured, with the consent of the latter, is a valid payment, under which it will be inferred that the policy in the hands of the agent is held for the insured.

White vs. Conn. Ins. Co., 120 Mass., 330; Case of Markey vs. Mut. Ben. Life Ins. Co., 126 Mass., 158, distinguished.

Wheeler vs. Watertown F. Ins. Co., Mass. S. J. C., 10 Ins. Law Jour., 354.

RECOVERY OF.

13. Shortly after payment of premium to the agent, the company was bankrupt. The agent had not paid the money over to the company. *Held*, that the money not having reached the company, and the consideration having failed, the company could not maintain an action for its recovery.

Farmers and Mechanics' Ins. Co. vs. Smith, 63 Ill., 187.

Held, that a failure to surrender the worthless policies by the insured, in the absence of any intention to hold the company liable, would not affect his right. *Held*, that if the money be paid over by the agent to the company before any demand is made by the insured, the agent will not be personally liable, but the mere passing of such money in account with his principal, without any new credit given, or further sums advanced in consequence, will not operate as a payment to the principal.

Chitty's Pleadings, vol. 1, p. 36; Storey on Agency, § 300; *Hearsy vs. Pruyn*, 7 John., 179.

Held, that the agent being notified by the insured that he claimed the money, was bound to return it to him.

Smith vs. Binder, Ill. S. C., 4 Ins. Law Jour., 809.

14. The underwriter of a ship may maintain a suit in admiralty for the premium upon a strictly marine policy, and is entitled to a lien upon the vessel for the payment. The libel or petition should aver not only the dates and amounts of the policies, but the names of the parties insured, and the character and extent of their several interests in the vessel.

Opinion of U. S. Dist. Court in same case indorsed (5 Ins. L. J., 931).

Orient Mutual Ins. Co. vs. Schooner Dolphin, U. S. C. C., E. D. Mich., 6 Ins. Law Jour., 528.

15. A debt due for the premium, is not a maritime lien upon the vessel.

Mutual F. Ins. Co. vs. Schooner Andrews, U. S. D. C., N. D. Ill., 7 Ins. Law Jour., 319.

GENERALLY.

16. Where the owner of premises borrowing money of a bank, gave a deed of trust on the same to secure its repayment, and

therein covenanted to have the buildings thereon insured and kept insured for the amount of the loan, and the condition also provided that if he failed to make such insurance, the trustee might at any time sell the property, whether the debt was due or not, and he did procure an insurance, payable to the trustee for the benefit of the bank, and paid the premium for the same: *Held*, that the prevention of the sale of the mortgagor's property under the power of sale, was a sufficient consideration for the payment of the premium on the policy for the bank. Where, pursuant to the terms of a loan by a bank and the terms of a deed of trust to secure the repayment of the sum evidenced by notes of the borrower, to keep the mortgaged property insured for the benefit of such bank, or the holders of the notes, as a further security, the borrower paid the premium and kept the property insured, making the policy payable to the trustee for the benefit of the bank, the bank which the trustee represented was held to be a party to the contract and the consideration, the additional security arising from the insurance being in consideration of the loan, and the premium paid being to perfect the security.

Hartford F. Ins. Co. vs. Olcott, Ill. S. C.

See Cross Index for other cases bearing on PREMIUM.

PREMIUM NOTE.

ABSTRACT OF THE LAW.

a. Premium notes though absolute on their face, may be limited as to their liability in the hands of the company, by the provisions of the charter or by-laws, but not in the hands of innocent third parties when negotiated.

Insurance Co. vs. Jarvis, 22 Conn., 133; *Fell vs. McHenry*, 6 Wr., 41; *Bell vs. Shibley*, 33 Barb. (N. Y.), 610.

b. Insolvency of the company is no bar to recovery on a premium note.

Illinois Central Ins. Co. vs. Wolfe, 37 Ill., 354; *How vs. Allen*, 1 Sandf., 171; *Clark vs. Middleton*, 19 Mo., 53.

c. But insolvency of the insured, which releases him from liability on his note, will release the insurer on the policy.

Reynolds vs. Ins. Co., 34 Md., 280.

d. If the policy be void for any cause, the premium note is usually also invalid in the hands of the company.

Frost vs. Saratoga County Mutual Ins. Co., 5 Denio, 154; *Tuckerman vs. Bigler*, 46 Barb., 373.

g. But a policy rendered inoperative through the fault of the insured, by the non-payment of assessments, will not avoid the note.

St. Louis Mutual Ins. Co. vs. Boeckler, 19 Mo., 135; *Atlantic Ins. Co. vs. Goodall*, 35 N. H., 228.

f. Termination of membership, with alienation of the property or otherwise, usually releases from liability on the premium note.

York Co. Ins. Co. vs. Turner, 53 Me., 225.

g. But payment of assessments already due, are a condition precedent to such a release from membership.

St. Louis Ins. Co. vs. Boeckler, *supra*; *Marblehead Mutual F. Ins. Co. vs. Underwood*, 3 Gray, 210.

h. Assessments, to be valid, must be made in conformity with the charter and by-laws, and to meet such obligations as insured is liable for.

Longpond Mut. Ins. Co. vs. Houghton, 6 Gray, 77; *Atlantic M. F. Ins. Co. vs. Ins. Co.*, 38 N. H., 451; *Herkimer Co. Ins. Co. vs. Fuller*, 14 Barb., 373; *York Co. Ins. Co. vs. Turner*, 53 Me., 225.

i. But notes which are made part of the general funds of the company for all purposes, may be assessed and applied arbitrarily by the officers.

Ins. Co. vs. Houghton, *supra*.

See further on this subject under ASSESSMENT, CHARTER, INSOLVENCY, MUTUAL COMPANIES, PREMIUM.

DIGEST OF RECENT CASES.

PREMIUM NOTE.

1. The company answered in defense that the premium was not paid in cash, but in a note which remained due and unpaid at the time of the fire, and which contained an agreement that if not paid at maturity the whole premium should be considered earned, and the policy should be void so long as it remained unpaid. *Held*, that the answer constituted a perfect defense. The agreement was part of the contract and the company was not liable.

Joliffe vs. Madison Mutual Ins. Co. (5 Ins. L. J., 254).

Gorton vs. Dodge Co. Mut. Ins. Co., *Wis. S. C.*, 39 *Wis.*, 121; 5 *Ins. Law Jour.*, 350.

2. The premium note was not paid at maturity, and suit was subsequently brought and collection made on execution. The pol-

icy stipulated that in case on non-payment at maturity, the liability of the company should cease, but might be revived by a voluntary payment before suit; that the commencement of suit should be an absolute cancellation of the policy, and the whole premium should be then earned and payable, and the commencement of suit should be notice of the fact, and the collection of the note by legal proceedings should not revive the liability of the company. *Held*, that instructions that the non-payment of the note at maturity did not of itself terminate the policy unless the company so elected, and notified the insured, and that the collection of the note without notification did not defeat recovery, was erroneous. *Held*, that the commencement of suit was sufficient notice, and the collection did not waive the forfeiture. The parties were competent to so contract.

Schultz vs. Hawkeye Ins. Co. (5 Ins. L. J., 354).

Shakey vs. Hawkeye Ins. Co., Iowa S. C., 44 Iowa, 540; 7 Ins. Law Jour., 223.

3. The articles of incorporation which, along with the by-laws, were incorporated in and made part of the policy of a mutual fire company, provided that the directors should determine the assessments necessary to pay losses, and notify the members in such manner as they should see fit. The by-laws provided that when such assessments had been made, and notice forwarded by mail or otherwise, and the insured should for the space of thirty days refuse or neglect to pay the same, the directors might sue for and recover the whole amount of the premium note given, and at their option annul the policy. Notice of assessment was duly sent by mail. The insured had gone to Europe, leaving an agent authorized to act in this and other matters. The postmaster was instructed to deliver all correspondence to the agent, but the notice, instead, was forwarded to insured in Europe, and upon its receipt there the necessary funds for the assessment were duly forwarded to the company. Meanwhile the thirty days had expired, and the directors declared the insurance suspended during the default. The house subsequently burned prior to the arrival of the funds, and the company refused to accept them. *Held*, that the failure to receive the notice was the misfortune of the insured, and she could not recover.

Cole vs. Iowa State Mut. Ins. Co., 18 Va., 425; Lathrop vs. Greenfield Stock and Mut. Ins. Co., 2 Allen, 82.

Held, that failure to pay was neglect to pay within the meaning of the policy.

Greeley vs. Iowa State Ins. Co., Iowa S. C., 50 Iowa, 86; 8 Ins. Law Jour., 817.

4. The policy was issued by a company of another State doing business in Michigan. The application was "for the term of five years;" the policy, in consideration of the cash premium and an installment note, agreed to make good any loss "during the term of five years." In the application the rate was fixed for but one year, and the first cash installment likewise was for a single year. The note was for the four succeeding years' premiums, payable in annual installments when due, without interest. The application provided that if any installment should be due and unpaid for 30 days, the policy should be void until the same was paid. The policy contained a like provision, and further, that upon the payment of all installments due, it should revive and be in force as to all subsequent losses, and no attempt to collect such note by legal process or otherwise should be deemed a waiver of the policy conditions. *Held*, that the provisions fixing an annual rate without interest and avoiding the policy until paid, are inconsistent with the idea of an absolute contract for insurance for five years. They imply simply a yearly policy issued upon the installment plan, to run for a period not exceeding five years. *Held*, that the policy condition permitting the company to cancel and return the unearned premium can only be interpreted on the assumption of a contract for a single year, renewable at pleasure, and an annual premium. If the cash payment and the note are a single payment of premium for the entire term, the unearned premium cannot be determined. The charter of the company provided that in case of failure to pay any installment when due, the whole note should become due, and the company might proceed to collect the same, and the policy provided that it was accepted upon the charter of the company, which was made a part of itself, and was to be resorted to to explain the rights and obligations of the parties "in all cases not herein otherwise

especially provided for." *Held*, that the insurance not being under the mutual plan, the charter could have no other force than such as was given it in the contract. *Held*, that the obligations of the insured as to payment of the premium notes was specially provided for in the contract, and under the latter, failure to pay an installment could not make the whole note due. *Held*, that a failure to pay the installment when due did not render the policy simply voidable, but absolutely void, with privilege of revival upon subsequent payment. *Held*, that if from any cause the risk of the company is suspended, there was no legal responsibility for the payment of premium during the period of suspension. *Held*, that the insurance being annual, the payment of any installment was optional with the insured. *Held*, that if the payment of such notes could be legally enforced, the statutes of Michigan prohibiting unauthorized companies could be evaded through the issue of yearly renewable policies by companies which had retired from the State.

Yost vs. American Ins. Co., 8 Ins. L. J., 41; *Banks vs. Werts*, 3 Ind., 203. Distinguishing *Williams vs. Albany City Ins. Co.*, 19 Mich., 451; *Amer. Ins. Co. vs. Reed*, 40 Mich. Excepting to *Amer. Ins. Co. vs. Healey*, 60 Ind., 515.

American Ins. Co. vs. Story, Mich. S. C., 8 Ins. Law Jour., 691.

5. The policy in a mutual company expressly stipulated that in case any assessment on the note given for the cash premiums or any part thereof should remain unpaid and past due at the time of a loss, the policy should be void, and the application contained a like provision. The insured at the time of loss had neglected to pay an assessment of which he had received due notice. *Held*, that the company was not liable if the assessment was authorized. *Held*, that in the absence of valid evidence to the contrary, the assessment must be assumed to have been properly made, and it was not necessary for the company to carry all its books and papers to a distant county to prove from them the necessity of such an assessment, when the objection was raised for the first time at the trial under the general issue.

Southern Mut. Ins. Co. vs. Taylor, Va. S. C. A., 10 Ins. Law Jour., 208.

6. Insurance for one year was effected by the owner through a broker, upon a steamboat, and a note for the premium given by the insured, payable in six months after date. The policy provided that if the note should not be paid at maturity, the premium should be earned in full, and collectible, and the policy forfeited. After the note fell due, the insurer forwarded it to the broker for collection, claiming the forfeiture of the risk. The broker, who was an officer in another insurance company, having also a risk on the boat, replied, "Continue the policy in force and we (his company) will guarantee payment of the note." To this the insurer made no reply. The broker had taken a good note as collateral security for the payment of all premiums due for insurances on the boat, which note fell due, was paid in a few days thereafter, and the broker sent the insurer a check for the amount of the premium note. The boat was then lost. The insurer accepted such payment, but claimed a forfeiture. *Held*, that the policy was forfeited before the loss, and the insured could not recover.

Fry vs. Franklin Ins. Co., Cinn. (O.) Sup. Ct., 8 Ins. Law Jour., 318.

7. A policy of insurance provided, among other things, that the company would not be liable for any loss happening during the time any order or note given for the premium should remain due and unpaid. *Held*, that this provision was a part of the contract for insurance, was valid and lawful, and no recovery could be had for a loss occurring during such time.

Forrest City Ins. Co. vs. School Directors, App. Ct. of Ill., 8 Ins. Law Jour., 879.

8. Failure to pay assessment on a premium note, simply suspends the policy during the time of default, although the latter stipulates that it shall be void if the assessment is not paid within a specified time. Levying a second assessment during such default, is not a waiver of the default. The fact that the policy is procured through an agent with express limited powers, not including collection of assessments, is no legal presumption of his right to make such collection, and payment of assessment to such

agent in labor, does not bind the company ignorant of the agreement.

Cochran vs. Crawford Co. Mut. Ins. Co., Pa. S. C.

9. A policy of insurance which is conditioned that the company will not be liable for any loss occurring when the premium note is wholly or in part past due and unpaid, is, under such circumstances suspended, in the absence of a waiver of the condition of the policy by the company. A waiver will not be inferred from an acceptance by the company of a part of the amount of the premium note after maturity, nor from an offer of extension of the time of payment not accepted by the insured, nor from a statement by the secretary of the company that the company was liable, under the law of the State, notwithstanding default in payment.

Garlick vs. Miss. Valley Ins. Co., Iowa S. C., 44 Iowa, 553.

WHEN NON-PAYMENT DOES NOT WORK A FORFEITURE.

10. A member of a mutual insurance company is liable on his premium note for assessments made by the company until the insurance is ended by one or the other party by notice, demand, surrender or cancellation. Mere non-payment of an assessment does not terminate such liability of the insured, although the policy provides that if an assessment be not paid within thirty days, the policy shall be void. The company may waive such forfeiture by making and demanding a subsequent assessment, which thereby becomes due.

Pearson vs. Chapin, 8 Wright, 9; *Atlantic Ins. Co. vs. Goodsell*, 35 N. H., 328; *Neeley vs. Onondaga County Ins. Co.*, 7 Hill, 50; *Hyatt, Receiver, etc., vs. Wait et al.*, 37 Barb., 29; *Wilson vs. Trumbull Mutual Fire Ins. Co.*, 7 Harris, 372; *Finley et al. vs. Lycoming County Mut. Ins. Co.*, 6 Casey, 311; *Hummel & Co.'s Appeal*, 28 P. F. Smith, 320.

Columbia Ins. Co. vs. Buckley et al., Pa. S. C., 83 Pa., 293; 6 *Ins. Law Jour.*, 631.

11. The policy provided that "This company shall not be liable * * until the premium therefor be actually paid." *Held*, that a provision avoiding the policy, if a note given for

premium be not paid at maturity, whether contained in the policy or the note, will be enforced unless waived, and mere delivery of the policy is not a waiver.

Muhleman vs. National Ins. Co., 6 W. Va., 508; *Bradley vs. Potomac Fire Ins. Co.*, 32 Mo., 103; *Pitt adm'r, vs. Berkshire Life Ins. Co.*, 100 Mass., 500; *Baker vs. Union Life Ins. Co.*, 43 N. Y., 283; *Bowditch Mutual Fire Ins. Co. vs. Winslow and others*, 3 Gray (Mass.), 432.

Held, that the delivery of the policy is a waiver of a provision declaring it invalid unless the premium is actually paid. But the mere handing of the policy to insured, to inspect and decide upon its acceptance, is not a legal delivery. *Held*, that a provision requiring payment of premium at a future time, can be waived by the company, and an adjustment of the company's liability would be a sufficient waiver.

Wood vs. Poughkeepsie Mut. Ins. Co., 32 N. Y., 619; *Boehm vs. Williamsburg City Ins. Co.*, 35 N. Y., 131; *Miller vs. Life Ins. Co.*, 12 Wallace, 288; *Eagan vs. Aetna F. & M. Ins. Co.*, 6 Ins. L. J., 832; *Bouton vs. Am. Mut. Life Ins. Co.*; *Wing vs. Harvey*, 27 Eng. L. & Eq. R., 140; *Buckbee vs. U. S. Am. Ins. & T. Co.*, 18 Barb., 541.

Mason vs. Citizens' F. Ins. Co., W. Va. S. C. A., 10 W. Va., 572; 6 *Ins. Law Jour.*, 842.

12. The policy was for five years. The insured paid the first annual premium, and gave a promissory note for the four succeeding premiums, payable by installments as each became due. The application contained an agreement that if any of the installments remained due and unpaid thirty days, the policy should be "null and void until the same is paid." The policy provided that it should not be liable in the case of default in the payment of any installment; also that "in case a promissory note is given for the cash premium, it shall be considered a payment, provided such note is paid at or before maturity," but in case any loss or damage should occur, and the note or any installment remain past due and unpaid at the time, the policy should be void; also, that on payment of all installments due, the policy should again attach. No installments were paid, and suit was brought on the note at the expiration of the policy. *Held*, that it was no part of the contract, that the insured might at any time absolve himself from the contract by voluntarily breaking it. *Held*, that the policy was not avoided by failure to pay the installments, but only voidable

at the option of the company, who in case of loss might elect to treat it as void. *Held*, that the premium note is not avoided by failure of the insured to pay the installments so long as the contract is not absolutely void from alienation or some other cause, and the company may maintain suit upon it.

American Ins. Co. vs. Henley, Ind. S. C., 60 *Ind.*, 515; 7 *Ins. Law Jour.*, 685.

13. The policy provided that if a note were given for the cash premium, it should be considered a payment, provided it was paid at or before maturity. But should any loss occur and the note or any portion of it remain unpaid and past due at the time, the policy should be void. The note for \$20 was due April 1st. A payment of \$10 was made on it in June following, when the insured delivered the policy for cancellation on account of an increase of risk, but the company elected to continue the contract in force, retained the note, and returned the policy uncanceled. A tender of the balance due on the note, was not made until after a loss had occurred, when it was refused. *Held*, that the insured had a right to pay the balance due at any time, and by such payment the policy would become operative. *Held*, that the return of the policy by the company was a waiver of forfeiture from the increase of risk, but did not waive the forfeiture for non-payment of the note. *Held*, that a portion of the note remaining unpaid at the time of loss, the plaintiff could not recover.

Watrous vs. Miss. Valley Ins. Co., 55 *Iowa*, 582; *Williams vs. City of Albany Ins. Co.*, 19 *Mich.*, 451; *Schmidt vs. Ins. Co.*, 41 *Ill.*, 295.

Nedrow vs. Farmers' Ins. Co., Iowa S. C., 43 *Iowa*, 24; 7 *Ins. Law Jour.*, 77.

14. Where it appeared that a note was given for the premium, and the policy contained a stipulation that, in case of loss or damage by fire, the premium note being past due and unpaid, the policy shall be void, it was *Held*, (the premium note having been past due and unpaid at the time of the fire,) that evidence that the defendant company, by previous transactions with plaintiff and others, had extended similar notes, would warrant the jury in coming to the conclusion that the defendant was estopped

from denying an agreement for extension, and insisting upon a forfeiture. If an insurance company intentionally, by language or conduct, leads its policy holders to believe that they need not pay their premium notes promptly, and that no advantage will be taken of the failure, it is equivalent to an express agreement to that effect, and is a waiver of any forfeiture expressed in the policy therefor. The case is different, where an agent agrees to receive payment in a debt due to himself, as in *Ferebu vs. Ins. Co.*, 68 N. C., 11, and the company had demanded payment under penalty of forfeiture.

Union Mut. Life Ins. Co., vs. Wilkinson, 13 Wall., 222.

McCraw vs. Old North State Ins. Co., N. C. S. C., 78 N. C., 149; 8 *Ins. Law Jour.*, 445.

15. The mere fact of a note for an insurance premium not being paid at maturity, does not of itself avoid the policy. It is the option of the insurance company to declare the policy forfeited. Proofs of loss are not necessary, if company has been notified of loss and informed insured that they would, in no event, pay the loss.

Wilson vs. Home Ins. Co. of Columbus, Madison Co. (Ohio) C. P., 8 *Ins. Law Jour.*, 880.

16. The articles of association of a mutual company, which were attached to and formed part of the policy, stipulated that before receiving his policy the applicant must give a premium note, and make a first payment thereon at once, and the by-laws, also a part of the policy, provided that the policy should become valid at noon, provided the note has been given and payment made. *Held*, that the delivery of the policy to the insured after its execution by the insurer, was a waiver of the condition precedent, of requiring the premium note of the insured to be delivered before the policy would take effect, and affords no ground of defense against the policy.

Kentucky Mutual Ins. Co. vs. Jenks, 5 Ind., 96; *Grant vs. Lexington Fire, Life and Marine Ins. Co.*, 5 Ind., 23; *Bone vs. Rising Sun Ins. Co.*, 20 Ind., 103; *New England Fire and Marine Ins. Co. vs. Robinson*, 25 Ind., 536; *New England Mutual Life Ins. Co.*, 32 Ind., 449; *United Life, Fire and Marine Ins. Co. vs. President and Directors of the Ins. Co. of North America*, 42 Ind., 588; *Lightbody vs. N. American Ins. Co.*, 23 Wend., 18; *Michigan State Ins. Co.*

vs. Lewis, 30 Mich., 411; Ins. Co. vs. Webster, 6 Wall., 129; N. F. & M. Co. vs. Schettler, 38 Ill., 166; Reaper City Ins. Co. vs. Jones, 62 Ill., 458; Fisk vs. New England Marine Ins. Co., 15 Pick., 310; Rochue vs. Williamsburgh City Ins. Co., 35 N. Y., 131; Pratt vs. N. Y. Central Ins. Co., 35 N. Y., 505; Paton vs. Medina Mutnal Fire Ins. Co., 20 Ohio, 529; Phenix vs. Cal. Co. Mutual Ins. Co., 18 N. Y., 392; Bryan vs. Forshee, 3 Blackfd., 316; Pickens vs. Bagall, 11 Ind., 295; Swank vs. Nichols, 22 Ind., 198; Parks vs. Evansville, Indianapolis and Cleveland Straight Line R. R. Co., 23 Ind., 569; Hardy vs. Stone ib., 599; Davar vs. Caldwell, 19 Ind., 493; Hamlin vs. Lovvitt, 26 Ind., 141; Blair vs. Hamilton, 48 Ind., 32.

Behler vs. Germ. Mut. F. Ins. Co., Ind. S. C., 9 Ins. Law Jour., 778.

17. A premium note given by the insured, was sent by the company, for collection on its maturity, to the bank where he had a deposit, and collections maturing, more than sufficient to meet the amount of the note. The cashier promised to pay the note and charge the same to the account of the insured, but failed to do so. The note was returned as unpaid, but was afterward returned and paid. The loss occurred in the interval. *Held*, that the bank was the agent of the company in collecting the note; the agreement of the cashier with the insured, amounted to a payment, and estopped the company from claiming a forfeiture for non-payment.

Gerlach vs. Amazon Ins. Co., U. S. D. C., Cleveland, Ohio, 4 Ins. Law Jour., 239.

18. A by-law of a mutual fire insurance company provided that "if the insured shall neglect for the space of ten days, when personally called on, or after notice in writing had been left at his last and usual place of abode or business, to pay any assessment, the risk of the company on the policy shall be suspended till the same is paid; and if the insured shall refuse to pay any assessment, or, if for any other cause, the risk is considered unequal or injurious to the company, the directors may terminate the same by giving notice thereof in writing, signed by the secretary, either personally or by mail, to the insured." Notice of assessment was sent to a policy holder by mail, but was not received by him. The directors of the company afterwards voted to cancel all policies, the holders of which had not paid the assessment, and a

notice of such cancellation was sent to the policy holder by mail, but was not received. *Held*, that, under the by-laws, the policy was not canceled.

Mullen vs. Dorchester Ins. Co., Mass. S. J. C., 121 Mass., 171.

19. Promissory notes were accepted by the agent in payment of assessments on a premium note, but were not paid at maturity; subsequently, further disputes arising, the insured sent his policy to the company for cancellation, with a request that all the notes be returned. *Held*, that a negotiable note given for assessments was payment, if so intended and treated by the parties. *Held*, that the policy was in force until the acceptance of the proposition to cancel, and notice of the same had been given to the insured.

Lycoming Mut. Fire Ins. Co. vs. Bedford, Pa. S. C., 5 Ins. Law Jour., 529.

20. When the company authorized the agent to change the amount of the policy, it is estopped to deny that it also authorized him to change the amount of a note given for the premium.

Merch. & Manf. Ins. Co. vs. Maguire, St. Louis (Mo.) C. A.

LIABILITY FOR NOTES AND ASSESSMENTS.

21. When the application was in the name of M. as president, and the premium note was signed M. per B., *Held*, that parol evidence was admissible to show on whom the liability for the note should rest in case of ambiguity. *Held*, that the president, as agent of the seminary insured, had authority to give the note through B.

Washington Mut. Fire Ins. Co. vs. St. Mary's Seminary, Mo. S. C., 2 Ins. Law Jour., 530.

22. A deposit note given to a mutual company aside from special stipulations, is just as completely within the control of the corporation as a cash premium, and may be assessed at the option of the company.

Commonwealth vs. Dorchester Mut. F. Ins. Co., Mass. S. J. C., 3 Ins. Law Jour., 15.

23. The charter of a mutual company provided that every person insured should deposit a note for an amount equal to the premium, to be assessed and collected as deemed expedient by the directors, and all such premiums and deposits should be considered the absolute funds of the company, and applied first to payment of expenses, second to money borrowed, and thirdly, to losses and notes given in payment of losses; and, in case the absolute funds were absorbed by losses, each member should be liable during the term of his policy, not exceeding two dollars for each dollar of premium and deposit. *Held*, that the absolute funds can be collected at any time and applied to any debts and liabilities whether before or since the insured became a member.

Ins. Co. vs. Harvey, 45 N. H., 292; and *Ins. Co. vs. Fitzpatrick*, 2 Gray, 279, distinguished; *Long Pond Ins. Co. vs. Houghton*, 6 Gray, 77.

Nashua Fire Ins. Co. vs. Moore, N. H. S. C., 52 N. H., 48; 4 *Ins. Law Jour.*, 494.

24. The charter provided that assessments on premium notes should be limited to losses incurred during the continuance of the policy, that they should be made equitably, that they should be liens on the property that may be compulsorily collected, and that the insurance should be void while they remained unpaid. *Held*, that the expiration, or surrender and cancellation of the policy, relieves the assured from all assessments on his premium notes, except such as were previously made. It rests on the underwriters to show that the assessment was one to which the insured was bound to contribute.

Atlantic Ins. Co. vs. Fitzpatrick, 2 Gray, 297.

The underwriter must show that the loss took place during the term of the policy, and all the members liable were ratably assessed.

Ins. Co. vs. Harney, 45 N. Y., 293; *Long Pond Ins. Co., vs. Houghton*, 6 Gray, 77, 82; *Herkimer Co. Ins. Co. vs. Fuller*, 15 Barb., 375; *Bangs vs. Gray*, 15 Barb., 272; *Ohio Co. vs. Marietta Co.*, 3 Ohio St., 350; *Ins. Co. vs. Harvey*, 45 N. H., 293; *Hart vs. Achilles*, 28 Barb., 576; *Dana vs. Munro*, 38 *ibid.*, 528.

It is not necessary that the assessment be levied with absolute accuracy, but there must be a fair and substantial compliance with the requirements of the charter. An assessment involving previous losses, and in which subsequent assessments were levied

on members who had paid to make up the deficiency of those who had not, without first endeavoring to secure compulsory payment, was not an equitable assessment in which failure to pay would forfeit the insurance. It was the duty of the company to have enforced the payment from solvent delinquents.

Planters' Ins. Co. vs. Comfort, Miss. S. C., 50 Miss., 662; 4 Ins. Law Jour., 84.

25. The C. insurance company was, by its charter, authorized to receive "as additional security to its dealers," notes for premiums in advance, which, as between the maker and the company, were liable for losses after the cash capital and other resources of the latter had been exhausted. In an action upon notes so given: *Held*, that the liability of the makers was not discharged by a change lawfully made by the company in its manner of doing business, although such change might decrease the cash assets; also, that as the makers were not sureties to the company, but to its creditors, they would not be discharged by wrongful acts of the company. Also: *Held*, that the word "exhausted" did not require the collection or sale, or an actual application of all other assets before resort could be had to the "security notes," but that where it clearly appeared that all the other resources of the company were insufficient to pay its liabilities, they should be regarded as exhausted within the meaning of the charter.

Osgood vs. Toole, N. Y. C. A., 60 N. Y., 475.

26. In a suit upon a premium note given in consideration of a policy of insurance, in a mutual insurance company, the defendants, to relieve themselves of liability thereon, alleged that the company was guilty of fraud in the manner of making its assessments, and offered evidence to show that assessment had been made largely in excess of the unpaid loans and losses of the company, and that defendants were assessed for losses which occurred prior to the date of the premium note, when defendants became members of the company. *Held*, that this evidence was properly admitted. The plaintiff asked the court to instruct the jury, that their verdict should be for the interest due on the note, the assessments claimed and interest thereon from the time they were severally payable. The court refused and instructed the jury that

the liability of defendants must be determined by them from the evidence. *Held*, that this was not erroneous, but that it may be rebutted by showing fraud, illegality or gross mistake in making the assessments. The onus of rebutting it is on the defendant, and wide latitude should be allowed. The insured of such a company are not liable to pay losses or expenses that occurred prior to the date when they became members of said company.

People's Fire Ins. Co. vs. Hartshorne & Co., Pa. S. C., 90 Penn., 465.

27. The by-laws of a mutual fire insurance company provided that "in all cases of the total loss of property insured the directors may require security for the payment of the deposit note, which shall be liable for its just proportion of losses till its full expiration;" and "any policy may be surrendered at the discretion of the insured; and in case of such surrender, the deposit note shall be liable to assessment for a just proportion of all losses and expenses during its continuance, and for no more; but until the surrendered policy is returned to the office, the deposit note shall be held liable to assessment for its just proportion of loss and expense." A member of the company suffered a total loss of a building insured, received the full amount of the loss and surrendered his policy. The company retained the note. *Held*, that the insured was liable for the note and for an assessment for losses incurred during the full term of the policy.

Boot and Shoe Manuf. Ins. Co. vs. Melrose Society, Mass. S. J. C., 117 Mass., 199.

28. Judgment entered on an assessment note, under the provisions of the charter of the People's Fire Insurance Company, is not a general judgment which may be enforced against any property of the insured, but is restricted as a lien to the property insured.

Halfpenny vs. the People's Fire Ins. Co., Pa. S. C., 85 Penn., 48.

29. Where the by-laws of the plaintiff, a mutual insurance company, provided for public notice, in two newspapers, of the assessment by the company upon its members, and required payment to be made of such assessments within sixty days after such

notice. *Held*, necessary, in order to maintain suit against a member, to aver and prove publication of such notice, and that the specified time has elapsed when the action brought.

Northampton M. & F. Ins. Co. vs. Stewart, N. J. C. E., 39 *N. J.*, 486.

30. A policy condition that where a promissory note is taken for the cash premium, if not paid in sixty days after it becomes due the obligations of the company shall be suspended until it is fully paid, is valid and enforceable.

Baker vs. Union Mut. Life Ins. Co. 43 *N. Y.*, 232; *Pitt vs. Berkshire Life Ins. Co.*, 100 *Mass.*, 500; *Wall vs. Home Ins. Co.*, 36 *N. Y.*, 157; *Williams vs. Albany City Ins. Co.*, 19 *Mich.*, 451; *Bodle vs. Chenango Ins. Co.*, 3 *Hill*, 161; *Gorton vs. Dodge Co. Ins. Co.*, *Wis. S. C.*

But such premium cannot be considered as earned in the absence of any special agreement to that effect. Cases cited above. Nor is any portion earned while the liability is so suspended; the risk and premium go together. *Held*, that after sixty days the company was entitled to recover only such proportion as had been earned, and the acceptance of the full cash after notice of loss, was a waiver of the suspension of the risk at the time of loss. A premium note was given for the note portion of the premium, which was afterward assessed and payment demanded. A resolution was subsequently passed that the policies on which such assessments had been levied and were not paid by a certain future date, should then be void and the amount should be collected by law. The assessment was not paid until after that date and after the subsequent loss. *Held*, that the assessment was a debt due, and its payment after the loss did not waive the forfeiture. But the forfeiture being declared conditionally *in futuro*, was a mere threat, and that it did not sufficiently specify the policies to be forfeited, therefore the company remained liable.

Joliffe vs. Madison Mut. Ins. Co., *Wis. S. C.*, 39 *Wis.*, 111; 5 *Ins. Law Jour.*, 278.

31. Persons insuring in a mutual insurance company are associated in the nature of limited or special partners. An insurance company was incorporated by act of Assembly in 1840; the insured to deposit a note in a sum fixed by the directors, of which

ten per cent was to be immediately paid, and part or whole of the remainder when the directors should deem it requisite for the payment of losses and expenses; and at the expiration of the insurance, so much of the note as remained unpaid to be given up. A supplement, in 1842, authorized a lien, waiving inquisition, on the property of the insured for the amount due on the note, the company filing a memorandum containing the name of insured, description of property, "amount of the note unpaid," etc. *Held*, that the act was valid. Defendant insured in 1870, the policy stipulating that he accepted it subject to the terms, etc., of "the act of incorporation and by-laws," etc. *Held*, that this waived his right to require the company to collect an assessment on the note otherwise than by the act of 1842. The constitution of the United States or of Pennsylvania did not preclude his waiving a trial by jury, and agreeing to the manner in which judgment might be entered against him.

Krugh vs. Lycoming Fire Ins. Co., Pa. S. C., 5 Ins. Law Jour., 7.

32. The insured executed a note promising "to pay the ——— Mutual Ins. Co., or order, ——— for premium for insurance policy ———. And it is further agreed that if this note is not paid at maturity the whole amount of premium on said policy shall be considered as earned, and the policy be null and void so long as this note remains overdue and unpaid. Interest at the rate of ten per cent per annum until paid." *Held*, that the obligation to pay was in no wise contingent on the forfeiture of the policy, and the instrument was a negotiable promissory note.

Cota vs. Buck, 7 Met., 788; Williams vs. Albany City Ins. Co., 19 Mich., 451; Ward vs. Perrigo, 33 Wis., 143; Sanders vs. Bacon, 8 J. R., 485; Hodges vs. Shuler, 22 N. Y., 114. Case of Blake vs. Coleman, 22 Wis., 415, distinguished.

Kirk vs. Dodge Co. Mut. Ins. Co., Wis. S. C., 5 Ins. Law Jour., 411.

33. A note was given for the premium, which provided that if not paid at maturity the premium should be considered earned and the policy void, and the company should not be liable while the note remained overdue and unpaid. The policy contracted

subject to the payment of the note, "according to the terms thereof, which constitute the basis of this insurance." It also provided that the company should not be liable "at a time" when the note was due and unpaid. Also that where the insured failed to pay the note at the time specified therein, the company should not be liable at a time when it should be overdue and unpaid; but if paid after maturity and before suit brought, the liability will again attach from that date. But suit might be brought after it had remained due and unpaid sixty days, and the commencement of such suit should cancel all liabilities and the premium be considered as earned and payable. *Held*, that the policy and note together, and not the note alone, constituted the contract.

Murdock vs. Chenango Ins. Co. 2 N. Y., 221.

Held, that the suit on the note, and its collection by legal proceedings, operated as a final cancellation of the policy, and the premium thus collected must be deemed to have been earned. Such a contract is valid.

Watrous vs. Miss. Valley Ins. Co., 33 Iowa, 582, and cases cited.

Shultz vs. Hawkeye Ins. Co., Iowa S. C., 42 Iowa, 239; 5 *Ins. Law Jour.*, 334.

34. The insured had made application on or before Oct. 1st, 1872, for continuous insurance in a mutual company, to take effect from the expiration of his previous policies. Afterward, and before the new policies were issued, the company had suffered heavily from fire. The secretary expressed his opinion to the insured that the company was sound, would be able to continue business, and had a large surplus. Acting on this opinion the insured paid the premiums and agreed that the deposit notes should be dated back from Oct. 1st. The opinion of the secretary proved erroneous, and the notes of the insured were afterward assessed to meet the losses of the fire. *Held*, that the insured must be considered as consenting that his membership should date back to Oct. 1st, and he must be held liable although the policies had not been actually outstanding at the date of the assessment. *Held*, that the opinion of the secretary not being given with a fraudulent design, or purporting to be more than a belief which

could not be regarded as groundless at the time, had not the effect of a warranty and did not relieve from liability.

Western Bank of Scotland vs. Addie, L. R., 1 H. of L., sec. 145; *Leather vs. Simpson*, L. R., 11 Eq., 393.

Commonwealth vs. Mech. Mutual Fire Ins. Co., *Mass. S. J. C.*, 120 *Mass.*, 495; 5 *Ins. Law Jour.*, 864.

35. The policy was for five years on the installment plan, the premium for one year being paid in cash, and a note given payable in four annual installments. It was stipulated that the failure to pay any installment would suspend the policy during the continuance of such default; but the company might thereupon enforce the payment of the whole note, and upon such payment, if no loss had occurred, the policy would revive. *Held*, that the stipulation was valid. The company upon default might recover the whole amount of the note, and not merely an amount proportionate to the period for which the risk had run.

Case of Penn Ins. Co. vs. Geraldin et al., 31 Mo., 30, distinguished. *Williams vs. Albany City Ins. Co.*, 19 Mich., 451.

American Ins. Co. vs. Klink, *Mo. S. C.*, 6 *Ins. Law Jour.*, 657.

36. There is no law which gives a lien upon a vessel for the premium for the insurance taken by the owners for their own benefit.

Thayer vs. Goodale, 4 La., 222; *Steele vs. Franklin Fire Ins. Co.*, 17 Penn. St., 290; *Turner vs. Stetts*, 28 Ala., 420; *White vs. Brown*, 2 Cushing, 412; *Stillwell vs. Staples*, 19 N. Y., 401; *Stark vs. Brown*, 7 La. An., 342.

The John T. Moore, *U. S. C. C. La.*, 7 *Ins. Law Jour.*, 207.

37. The company's charter provided that its powers and liabilities should be those of a mutual company only. Policies were issued on the cash plan, permitting the policy holder to share in the profits, but exacting no further liability, and on the note plan, requiring a cash assessment of ten per cent, and the notes were liable to further assessment to their full amount to meet losses and expenses. *Held*, in a suit to recover assessment on a note, that the cash policy was essentially different from a stock policy. The issue of cash policies was not inconsistent with the functions

of a mutual company also doing business on the note plan, and did not debar a recovery of assessments on the notes.

Ins. Co. vs. Hoge, 21 Howard, 64; *May on Ins.*, 542; *Mygott vs. N. Y. Protection Ins. Co.*, 21 N. Y., 52; *White vs. Havens*, 20 N. Y., 177; *Perrin vs. Susquehanna Ins. Co.*, 7 W. & S., 351.

Held, that the directors had a right to make assessments to pay debts after the company had executed a general assignment for the benefit of creditors.

Schimpf & Son vs. Lehigh Valley Mut. F. Ins. Co., Pa. S. C., 7 *Ins. Law Jour.*, 663.

38. The maker of a premium note, given to a mutual insurance company for the nominal premium upon an open policy, executed to cover such risks as may be afterward indorsed thereon, is liable to the company on such note, only to the amount of the actual premiums upon the risks assumed by the company and indorsed thereon. Where a premium note for an open policy is given after the organization of the plaintiff corporation, and after application for insurance to the amount required by its charter to authorize the issuing of policies, by one of the original subscribers who had paid his former note, given for the purpose of starting the company in business, and for the better security of those concerned, it is for the jury to determine whether the note thus subsequently given is for an ordinary policy, or for "the better security of those concerned."

Howard vs. H. & E. Iron Co., 64 Me., 93, distinguished. *Maine Ins. Co. vs. Farrar*, 66 Me., 133.

Maine Mutual Marine Ins. Co. vs. Stockwell & Co., Me. S. J. C., 7 *Ins. Law Jour.*, 308.

39. The insured property was the separate property of a married woman in Indiana, in whose name the application was made, being signed by herself and her husband. A promissory note was given for the premiums, and also signed by the insured and her husband. *Held*, in an action to recover the amount of the note, and to make the same a lien upon the property, that it is a settled law of Indiana that a married woman during her coverture, cannot make a promissory note which will be valid or binding on her. *Held*, that the promissory note was absolutely void as

to the insured, and her separate estate was not chargeable with its payment.

Bowers vs. Vanwinkle, 41 Ind., 432; *Hodson vs. Davis*, 43 Ind., 258; *Mahar vs. Martin*, 43 Ind., 314; *Brick vs. Scott*, 47 Ind., 299; *Thomas vs. Passage*, 54 Ind., 106; 1 R. S., Ind., 1876, pp. 412, note 2, pp. 550; *Behler vs. Weyburn*, Ind. S. C., 1878; *Glidden vs. Strupler*, 52 Penn St. Rep., 400.

American Ins. Co. vs. Avery, Ind. S. C., 7 Ins. Law Jour., 679.

40. The plaintiff effected insurance for five years, paying \$1.50 in cash and giving a note stipulating for the payment of a like sum at the end of the first year, and a like sum at the end of the second year, etc. The policy provided that in case the insured should fail to pay the installments mentioned in the note within thirty days after the same became due, the policy should be void during the time of default, but should revive upon payment of the amount due. *Held*, that the contract was an absolute insurance for only one year, with the right of the insured to keep it in force from year to year upon payment of the installments. *Held*, that the payment of the installments was optional with the insured. The company had no other remedy in case of default than the temporary avoidance of the policy.

Clark vs. Babcock, 23 Mich., 167; *Friedland vs. McNeil*, 33 Mich., 43. *Case of Williams vs. Albany City Ins. Co.*, 19 Mich., 462, distinguished.

Yost vs. American Ins. Co., Mich. S. C., 39 Mich., 531; 8 Ins. Law Jour., 41.

41. The charter of a mutual company provided that the directors, after the determination of the loss by a member, shall determine the sum to be paid by the several members as their respective proportions, and such sum should be in proportion to the original amount of their deposit notes. *Held*, that as the assessment was one calling for the exercise of judgment and discretion, it could not be delegated.

Case of Atlantic Mut. Ins. Co. vs. Sanders, 36 N. H., 252, distinguished. *Gillis vs. Bailey*, 21 N. H., 162, 2 Kent's Com., 633; *Rex vs. Gravesend*, 2 B. & C., 602; *Stoughton vs. Baker*, 4 Mass., 522; *Emerson vs. Company*, 12 Mass., 237; *Brewster vs. Hobart*, 15 Pick., 307; *Coles vs. Trecothick*, 9 Ves., 236; *Commercial Bank of Lake Erie vs. Norton*, 1 Hill's Rep., 501; *Tibbetts vs. Walker*, 4 Mass., 595; *Lyon vs. Jerome*, 26 Wend., 485; *Percy vs. Millendon*,

3 La., 568 ; Commissioners vs. Bank of Buffalo, 6 Paige, 497 ; Haven vs. N. H. Asylum, 13 N. H., 535 ; Blore vs. Sutton, 3 Meriv., 237.

Held, that a resolution passed by the directors, that whereas they had made all the assessments they are authorized to make, therefore resolved that the treasurer give up the premium notes when the parties have paid all assessments, was not a ratification of the assessments, which was in reality made by other parties. *Held*, that an assessment made to supply a deficiency arising from uncollected assessments not made during the existence of the defendant's policy, is invalid as to him.

Long Pond Ins. Co. vs. Houghton, 6 Gray, 77.

Farmers' Mutual Fire Ins. Co. vs. Chase, N. H. S. C., 56 N. H., 341 ; 5 *Ins. Law Jour.*, 689.

42. The premium notes held by a mutual company represents its capital stock as regards those who are not members and are insured under all-cash policies. Whenever by assessment regularly made, any part of such notes becomes due, there is such an indebtedness in favor of the company as may be attached by any of its creditors other than the members, and an all-cash claimant may thus attach the funds in the hands of the premium note makers, although the assessment was ordered to meet other losses besides his own.

Peterson vs. Sinclair, and cases cited, 2 Norris, 250.

Hayes vs. Lycoming F. Ins. Co., Pa. S. C., 10 *Ins. Law Jour.*, 507.

43. Where the charter of an insurance company authorized it to conduct its business wholly or in part upon the mutual principle, or wholly or in part upon the cash principle, and a policy recited that the insurance in question was made in consideration of a certain specified sum as cash premium, and an installment note payable absolutely at specified times ; *Held*, that recovery could be had upon the note without proof of losses, and an assessment as upon the mutual plan. It is competent for an insurance company to reinsure upon its risks, and it may transfer its property, including premium notes, as a consideration therefor. A failure to comply with the provisions of chapter 138, Laws of 1868, will

not prevent a company from indemnifying itself by reinsurance for risks already assumed.

Davenport F. Ins. Co. vs. Moore, Iowa S. C., 50 Iowa, 619.

44. Plaintiffs were insured in a mutual horse company. The directors passed a resolution, allowing dissatisfied members to withdraw upon payment of assessments and surrender of the policy. Plaintiffs handed their policies to a director, and paid the assessment demanded. But finding that there were previous unpaid assessments against them, the policies were not canceled, and upon the subsequent failure of the company, these policies were assessed with the rest to make good the deficiency. *Held*, that a policy of insurance and the premium note given therefor, constitute a contract between the company and the insured, and the parties usually have the same power to rescind it by mutual agreement as they had to make it. The right of a company to cancel policies and thus terminate the contract, for various acts of the insured, has constantly been recognized.

Boland vs. Whitman, 33 Ind., 64; Wadsworth vs. Davis, 13 Ohio St., 123; Columbia Ins. Co. vs. Masonheimer, 26 P. F. S.; Wilson vs. Trumbull Ins. Co., 7 Harris, 372; Hyde, receiver, vs. Lynde, 4 N. Y., 387; Distinguishing Marine Mutual Ins. Co. vs. Pickering, 66 Me., 130.

An agreement made in good faith between the parties to a contract of insurance to annul it, is valid. When the insured surrenders his policy, and it is marked canceled, from that moment he ceases to be a member, though he continues liable to assessments for losses which accrued while he was a member.

Acker, receiver, vs. Hite et al., Pa. S. C., 10 Ins. Law. Jour., 20.

45. It is a good defense to a premium note to a mutual insurance company of another State, that the note was given in Indiana to an agent of the company, the company not having complied with the Indiana statute respecting foreign corporations. Mutual insurance companies are clearly within the statute. A State allowing a foreign corporation to do business within its limits, may impose such reasonable conditions as it sees fit. *Payson vs. Withers, distinguished.* The order of assessment by the court does not bind the maker as to the validity

of the note—his defense to the note can be heard when action is brought upon it.

Lamb vs. Lamb, U. S. D. C. Ind., 4 Ins. Law Jour., 938.

46. A premium note given to a mutual insurance company, when sued on, requires an affidavit of defense. It is not sufficient to aver that the funds of the company have been wasted or badly managed; it must be stated that they are not required to cover losses or pay debts. The member of a mutual company is responsible for bad management and must pay his portion of losses until his whole note is exhausted, although thereby no fund is left to secure his property against loss.

Hackney vs. Alleghany Ins. Co., 4 Barr., 185; Sterling vs. Mercantile Mutual Ins. Co., 3 Casey, 75; Coil vs. Pittsburg Female College, 4 Wright, 439.

If fraudulent acts are relied on by way of defense, their nature and character should be set forth that the court may judge how far they would tend to relieve the defendant, or to what extent he, as a corporator, may be considered a participant.

West Branch Ins. Co. vs. Smith, C. P. Dauphin Co. Pa., 5 Ins. Law Jour., 319.

47. It was claimed that insured had been induced to give the promissory notes for premiums sued on by false representations of the agent that he had an office in the same place where the premiums could be paid. *Held*, that the mere fact of such representations being made by an agent without proof that he was acting within the scope of his authority will not relieve the insured from liability, especially where the policy was held for three years without protest or attempt at cancellation.

American Ins. Co. vs. Kuhlman, St. Louis (Mo.) C. A., 9 Ins. Law Jour., 400.

48. The company in a suit to recover on premium notes must give evidence of losses requiring the assessment, but need not show the particular loss for which each assessment was made.

Merch. & Manf. Ins. Co. vs. Linchey, St. Louis (Mo.) C. A.

49. The suit was on an installment note given for premiums

on a five-year policy. It was alleged that the agent represented to the insured that he could quit at the end of a year if desired, and the object in signing the notes was to avoid annual applications; that the insured refused to pay the note at the end of the year, thinking the policy would be void and he would be released from liability. *Held*, that a party must know at his peril the legal effect of an instrument he signs. Misrepresentations which will avoid a policy on the ground of fraud, must be misrepresentations of fact such as may mislead a man of ordinary prudence. This was not of such nature. In fact it was a misrepresentation of the legal effect of an instrument.

American Ins. Co. vs. Capps, St. Louis (Mo.) C. A., 6 Ins. Law Jour., 862.

See Cross Index for other cases bearing on PREMIUM NOTE.

PRESIDENT.

See OFFICERS.

See Cross Index for cases bearing on PRESIDENT.

PROFITS.

ABSTRACT OF THE LAW.

a. Expected profits may be a legitimate subject of marine insurance, but the authorities are not agreed in all cases as to the principles applicable to the determination of such profits, or what constitutes an insurable interest, apart from actual ownership at the time of loss. In case of ownership, the presumption of law favors an expected profit.

French vs. Hope Ins. Co., 16 Pick., 397; Stirling vs. Brown, 11 East., 629; Grant vs. Parkinson, 3 Doug., 16; Patapsco Ins. Co. vs. Coulter, 3 Pet., 222; Loomis vs. Shaw, 2 Johns. Cas., 36.

b. There may be a separate abandonment of profits; but usually an abandonment of the goods involves also that of the expected profits.

Loomis vs. Shaw, 2 Johns. Cas., 36; Mumford vs. Hallett, 1 Johns., 433.

c. Profits are also a legitimate subject of insurance under a fire policy, but they must be specifically insured; expected profits cannot be claimed as a legitimate part of the loss under the ordinary contract.

Niblo vs. N. A. Ins. Co., 1 Sandf. (N.Y.), 551; *Leonarda vs. Phoenix Ins. Co.*, 2 Rob. (La.), 131.

d. But the insurance of such interests as those of consignee, or commission merchant, may, by necessary implication, include the expected profits.

Parks vs. Ass. Co.; 5 Pick. (Mass.), 31; *Shaw vs. Aetna Ins. Co.*, 49 Mo., 578.

See further on this subject under INSURABLE INTEREST, MEASURE OF DAMAGES, POLICY.

DIGEST OF RECENT CASES.

1. Where the insured made large profits from illegal rectifying and distilling, but made no claim for profits, it cannot be said that they insure for profits. The question is, what was the actual loss, not of profits but of property.

Bayly & Pond vs. London and Lancashire Ins. Co., U. S. C. C., 4 *Ins. Law Jour.*, 503.

See Cross Index for other cases bearing on PROFITS.

PROHIBITED RISKS.

ABSTRACT OF THE LAW.

a. Risks prohibited by the terms of the contract will usually forfeit the policy when so stipulated.

Kelly vs. Home Ins. Co., 97 Mass., 288; *Lee vs. Howard Ins. Co.*, 3 Gray (Mass.), 183; *Appleby vs. Astor F. Ins. Co.*, 54 N. Y., 253.

b. But where the risk insured includes by implication any of the risks prohibited in the general classification of hazards, the general prohibition will be ineffectual, unless the language be so specific as to leave no room for doubt; thus insurance on a stock in trade which includes by necessary implication a prohibited risk, will be held valid.

Stienback vs. Lafayette F. Ins. Co., 54 N. Y., 98; *Whitmarsh vs. Conway Ins. Co.*, 16 Gray (Mass.), 359.

c. Whether insurance for a hazardous purpose will permit the introduction of other hazards of the same class, the courts are not agreed.

Matthews vs. Queen City Ins. Co., 2 Cin. S. C., 109; *State Mutual F. Ins. Co. vs. Arthur*, 30 Penn. St., 315; *Reynolds vs. Commerce Ins. Co.*, 47 N. Y., 597.

d. Policy stipulations regarding prohibited risks, will be strictly construed against the insurer, and will not be held to cover a violation of the letter, which is not within the spirit of the prohibition.

Hoffmann vs. Aetna Ins. Co., 32 N. Y., 405; *Reynolds vs. Commerce Ins. Co.*, 47 N. Y., 597; *Smith vs. Mechanics and Traders' Ins. Co.*, 32 N. Y., 399.

e. If the prohibited risk be usual in the business, it is of no consequence that it might have been avoided by the substitution of something less dangerous.

Harper vs. Albany Mutual Ins. Co., 17 N. Y., 98; *Bryant vs. Ins. Co.*, 17 N. Y., 200; *Whitmarsh vs. Conway Ins. Co.*, 16 Gray (Mass.), 359.

f. A prohibited use by one lawfully in possession as owner, will generally avoid the policy irrespective of the increase of the risk.

Witherall vs. City Ins. Co., 16 Gray (Mass.), 276; *Macomber vs. Howard Ins. Co.*, 7 Gray (Mass.), 257.

g. A temporary use or risk prohibited by the policy, will not usually work a forfeiture if it does not exist at the time of loss.

Mutual F. Ins. Co. vs. Coatsville Shoe Factory, 80 Penn., 375.

h. The use must be habitual and not occasional or accidental.

Williams vs. Firemen's Ins. Co., 54 N. Y., 569; *Maryland Ins. Co. vs. Whitfield*, 31 Md., 219; *Hartford Ins. Co. vs. Harmer*, 2 Ohio St., 452.

i. The insurer is presumed to know the usages of the business and to contract with such usages in view.

Grant vs. Lexington Ins. Co., 5 Ind., 23; *Citizens' Ins. Co. vs. McLaughlin*, 53 Penn. St., 485.

See further on this subject under POLICY, RISK, USE.

DIGEST OF RECENT CASES.

PROHIBITED RISKS—WHEN THE POLICY IS AVOIDED.

1. A stock of goods consisting of such as are usually kept in a grocery store, was insured. But all kinds of burning fluids were expressly prohibited to be kept. *Held*, that the keeping of such fluids was a violation of the policy, though usually kept.

Portsmouth Ins. Co. vs. Brinckley's Adm'r, Va. C. A., 2 *Ins. Law Jour.*, 842.

2. The policy provided that no loss should be paid in case of collision, except fire ensue, and then only for damage by fire. And no loss should be paid arising from petroleum or other explosive oils. Also that petroleum, etc., should not be stored, used, kept or allowed on the premises without consent, except for lamps to be drawn and filled in daylight, or the policy should be

void. Also, that the company should not be liable for damage by explosion unless fire ensue, and then for loss by fire only. The policy covered the goods of an express company while in course of transportation. The train conveying the goods collided with an oil train, the petroleum from which, taking fire, consumed the car and contents. *Held*, that the meaning of the language was not simply that loss arising from explosion should be exempted, or loss arising from petroleum carried by the parties, or in the same conveyance, but that in case of collision the damage should be restricted to that done by fire only, except where the fire arose from petroleum or other explosive oil, in which case the company should not be liable. *Held*, that the loss was not covered by the policy.

Imperial Fire Ins. Co. vs Fargo, U. S. S. C., 7 Ins. Law Jour., 236.

WHEN THE POLICY IS NOT AVOIDED.

3. A clause in a policy on the stock of a paper-mill, prohibited the storage or use of petroleum, rock and earth oils, benzine, benzole and naphtha without consent; it also provided that refined coal, carbon and kerosene oil, when stored in less amounts than ten barrels, shall be classed as extra hazardous. Another clause provided that camphene, spirit gas, or burning fluid, phosgene, or any other inflammable liquid, when used in stores, warehouses, shops or manufactories for light, subjects the goods therein to additional charge, and permission for such use must be indorsed on the policy. *Held*, that kerosene is a rock oil, but not an inflammable liquid, and it was not intended to prohibit its use for lighting purposes, nor the storage of forty gallons, which was not an excessive amount for that purpose.

Buchanan vs. Exchange Fire Ins. Co., N. Y. Com. A., 4 Ins. Law Jour., 458.

4. The keeping of a small quantity of saltpetre for the purpose of preserving meat and other stock in a store, is not a storing within the meaning of the clause prohibiting the storing and selling of certain extra-hazardous articles.

Dobson vs. Sotheby, 22 Eng. Com. Law, 481; O'Neill vs. Ins. Co., 3 Comstock, 127.

To avoid the policy there must be such a quantity stored and sold as would amount to a substantial violation ; to charge that if the prohibited article was stored and sold in any considerable quantity the policy was avoided, was not error.

Bayly and Pond vs. London and Lancashire Ins. Co., U. S. C. C., 4 Ins. Law Jour., 503.

5. A condition of a policy of insurance upon the merchandise of a store stipulated that no petroleum should be kept or had on the premises. The insured kept a barrel of petroleum at a time for sale, and the company claimed this avoided the policy. The Court below instructed the jury that "merchandise" included whatever it was customary to keep in such a store, and if a supply of petroleum such as was kept on the premises was a part of the usual stock of the store, the plaintiff could recover. *Held*, to be error. *Held*, further, that the effect of the condition of the policy was not changed by the fact that the agent of the company knew that petroleum was kept on the premises at the time the insurance was effected.

Birmingham Fire Ins. Co. vs. Kroegher, Pa. S. C., 83 Penn., 64.

6. A policy of fire insurance was upon a stock of "general merchandise of all kinds usually kept in a country retail store." The policy provided against loss by fire to the property specified, "except as hereinafter provided." Immediately following this clause was a condition that the company should not be liable unless by special consent in writing indorsed on the policy, for any loss where "turpentine or benzine" were deposited, stored, kept or used on the premises. Turpentine and benzine were both kept for sale, but no consent had been given therefor. *Held*, that this was a violation of the condition and avoided the policy. The insurance clause on the general stock of merchandise was in the written portion of the policy. The prohibitory clause was in the printed portion. The court below instructed the jury that the latter was repugnant to the former and could not be interpreted so as to prevent a recovery, if they found that "turpentine and benzine" were part of all kinds of merchandise usually kept in a country store. *Held*, to be error.

Insurance Co. vs. Lenheim, Pa. S. C., 89 Penn., 497.

7. A policy of fire insurance provided that the insurer should not be liable for loss occasioned by the use of kerosene oil as a light in any barn or outbuilding. In an action upon the policy: *Held*, that the condition was not simply a provision against the habitual use of the oil, but that its use upon a single occasion, if it caused a loss, *i. e.*, if loss would not have resulted if other oil had been used, forfeited the policy. Also: *Held*, that the condition contemplated and provided against the danger resulting from the upsetting or breaking, by some intervening accident, of a lamp filled with the oil named, as well as to a direct and immediate effect therefrom, such as an explosion.

Matson vs. F. B. Ins. Co., N. Y. C. A., 73 N. Y., 310.

8. In an action on a policy, the complaint avers that when the policy was issued the building was lighted by gasoline; that insured was removing the burners and replacing them with kerosene lamps with the knowledge of the agent; that the agent agreed "at the time of the delivery of said policy and thereafter before the fire as hereinafter stated, that said premises might be lighted with gasoline gas until such change could be conveniently effected," and that the said generator was not changed at the time of the fire, and that plaintiff used due diligence in removing the burners, etc. A written agreement in the policy permitted the use of gasoline when the generator was removed 30 feet. *Held*, that the words "as hereinafter stated," must be held to refer to the fire and not to the agreement, and such agreement is sufficiently averred.

Winans vs. Allemania Fire Ins. Co., Wis. S. C., 38 Wis., 342; 5 Ins. Law Jour., 203.

9. *Construction of Policy.*—The policy provided that "the generating or evaporating within the building, or contiguous thereto, of any substance for a burning gas, or the use of gasoline for lighting, is prohibited, unless by special agreement indorsed on this policy. *Held*, that gasoline works for lighting the building fifty feet distant, were not contiguous within the meaning of the policy. *Held*, that the use of gas so generated from gasoline is not "the use of gasoline" within the meaning of the policy.

Arkell vs. Commerce Ins. Co., N. Y. C. A., 69 N. Y., 191; 6 Ins. Law Jour., 251.

10. Where a policy forbids the keeping of benzine, camphene, "or any explosive," it is a question of fact for the jury whether or not certain alcohol kept by the insured was an explosive. At any rate it cannot be considered in the absence of a finding to that effect. If such a policy authorizes the keeping of kerosene of a certain quality, it will rest upon the insurers, in case of loss, to show, (1) that the kerosene was not of that quality, and (2) that the fire originated or was influenced by the kerosene kept. Where the insured complies substantially with all the requirements of the contract between himself and the insurers, immaterial variations will not vitiate it.

2 Pars. on Cont., 426, 461.

Willis vs. Germania, etc., Ins. Co., N. C. S. C., 79 N. C., 255; 8 Ins. Law Jour., 449.

11. The prohibition of the keeping of gunpowder, fireworks, saltpetre, etc., in a policy of insurance on a stock of "drugs and medicines," is not a prohibition against the keeping of saltpetre as a drug, but only in such manner and quantity as would increase the risk. Where, in such case, saltpetre was on hand as a part of the stock of drugs at the time the policy issued, being an article usually kept in drug-stores, it was as a part of the stock insured, and although specially prohibited by the terms of the policy, the policy was not thereby avoided.

Wood on Ins., 840.

Collins vs. Farmville Ins. and Banking Co., N. C. S. C., 79 N. C., 279; 8 Ins. Law Jour., 453.

12. The policy prohibited the keeping of benzine, but insured "such merchandise as is usually kept in a country store," and "drugs and medicines." There was also evidence that the general agent told insured that benzine was covered. *Held*, that the policy was not avoided by keeping benzine, though it provided that the agent had no power to waive the contract. The reference was to local agents and not to the general agent who represented the company.

May on Ins., 145.

Carrigan vs. Lycoming F. Ins. Co., Vt. S. C., 10 Ins. Law Jour., 606.

13. A clause in an insurance policy against "keeping or using camphene, spirit-gas, burning-fluid or chemical oils," is not violated by using a burning-fluid not in its nature like camphene or spirit-gas. The burden of proof shows the character of the fluid used, and its similarity to those named in the same clause of the policy, is on the insurance company. Keeping a burning-fluid, the use of which is not, by the express terms of the policy, prohibited as a light, in moderate quantities, to fill the lamps used on the premises from day to day, is not "keeping or storing" the oil in a sense intended to be prohibited by those terms; nor was it "so using the premises as to increase the risk" within the meaning of the policy. The case being tried, both on the pleadings and evidence, on the theory that there was a violation of one special clause in a policy, it is too late to contend in the appellate court that there was a violation of other clauses not relied upon at the trial.

Wheeler vs. American Central Ins. Co., St. Louis Ct. of Appeals, 8 Ins. Law Jour., 318.

14. The policy stipulated it should be void, "if camphene, burning-fluid, or refined coal or earth oils are kept for sale, stored, or used on the premises without written consent." The agent inspected the premises, saw the means of lighting them and was informed that kerosene was used for the purpose, and thereupon procured the policy in question. *Held*, that while kerosene may be deemed a coal oil in the commercial sense, the prohibition was not so clear in its terms as to unmistakably indicate to the insured that the use of kerosene was prohibited, and under the circumstances the policy must be presumed not to have intended its prohibition. *Held*, that the knowledge of the agent was a waiver of the required consent.

Vau Schaick vs. Niagara Ins. Co., 68 N. Y., 434, and cases cited.

Bennett vs. N. B. & Mer. Ins. Co., N. Y. C. A., 9 Ins. Law Jour., 585.

15. A policy of insurance contained the following provisions: "Or if the assured shall *keep or have* in any place or premises where this policy may apply, petroleum, naphtha, benzine, benzole, gasoline, benzine-varnish, or any product in whole or in part of

either; or gunpowder, fireworks, nitro-glycerine, phosphorus, saltpetre, nitrate of soda, or keep, have or use camphene, spirit gas, or any burning fluid or chemical oils, without written permission in this policy, then and in every such case this policy shall be void." The assured took benzine upon the premises and with due precautions used it for cleaning some machinery there. *Held*, that words "keep or have" were intended to prevent permanent or habitual storage of the prohibited articles. The bringing upon the premises for a single occasion as needed for cleaning the machinery, was not keeping or having it there within the meaning of the policy, nor such a use as was contemplated by the parties.

Dobson vs. Sotheby, 1 M. & M., 90; Shaw vs. Robberds, 6 A. & E., 75; Grant vs. Howard Ins. Co., 5 Hill, 10; Van Volkenberg vs. Ins. Co., 70 N. Y., 605; Franklin Ins. Co. vs. Chicago Ice Co., 36 Md., 102; Raferty vs. Ins. Co., 29 Maine, 97; Neil vs. Buffalo Fire Ins. Co., 3 Comstock, 122. Case of Birmingham Fire Ins. Co. vs. Kroegher, 2 Nor., 64, distinguished.

Carbon oil is not named in the condition, and if it was of the nature of camphene or spirit gas or other enumerated articles, it was not shown to be so, and the court cannot take judicial notice of it. The words burning fluids or chemical oils must be held to mean only such burning fluids and chemical oils as are in their nature like camphene or spirit gas.

Wheeler vs. American Central Ins. Co., 8 Ins. L. J., 318; Woods vs. North Western Ins. Co., 46 N. Y., 421; Morse vs. Buffalo Fire and Marine Ins. Co., 30 Wis., 534; Wills vs. Hanover and Germania Fire Ins. Co. The Reporter, vol. 8, p. 343.

The use of benzine not being prohibited in terms, it is a question of fact for a jury whether it comes within the description of "burning fluids or chemical oils," and in the absence of proof it is not a matter of which the court will take judicial notice.

Wood vs. N. W. Ins. Co., and Morse vs. Buffalo F. & M. Ins. Co., *supra*.

Mears vs. Humboldt Ins. Co., Pa. S. C., 9 Ins. Law Jour., 139.

16. The policy provided that it should be void in case petroleum or its products, by whatever name called, should be kept. There was evidence that "mineral sperm oil" was used in lighting the boat insured. When the testimony as to the meaning of this

term was simply as to the statements of manufacturers, a finding of the jury under instructions that they must find for the defendants if it was a product of petroleum, is conclusive. It was not error to exclude samples of oil so called, as evidence, when it did not appear that the samples were taken from the stock of the boat, and the term was a fancy name, which might be applied to very different compounds. Where the insured property is in charge of agents, and the insured is in a distant place, having no knowledge of the circumstances of the loss, proofs of loss furnished by the agent may be a substantial compliance with the requirement of the policy. Where an honest effort had been made by an agent to furnish proofs, a demand by the company that they should be furnished by the insured, was a waiver of a subsequent objection that these were too late, where the prescribed time remaining was not sufficient to permit of compliance.

Hicks vs. Empire F. Ins. Co., St. Louis (Mo.) C. A., 8 Ins. Law Jour., 320.

See Cross Index for other cases bearing on PROHIBITED RISKS.

PROOFS OF LOSS.

ABSTRACT OF THE LAW.

a. Proofs of loss, when required, are a condition precedent to recovery, and the requirements must be substantially complied with.

Wright vs. Ins. Co., 36 Wis., 522; Edgerly vs. Farmers' Ins. Co., 43 Iowa, 587; Protection Ins. Co. vs. McPherson, 5 Ind., 417; Noonan vs. Hartford Ins. Co., 21 Mo., 71; Germania Ins. Co. vs. Curran, 8 Kan., 9; Columbian Ins. Co. vs. Lawrence, 10 Pet. (U. S.), 507.

b. Proofs must be furnished within the stipulated time if fixed, or within a reasonable time, if no special period is named, unless the requirement has been waived.

Planters' Mutual Ins. Co. vs. Deford, 38 Md., 382; Eastern R. R. Co. vs. Relief Fire Ins. Co., 105 Mass., 297.

c. The question of what constitutes a reasonable time is one of fact for the jury under the circumstances.

Wyman vs. Western Ins. Co., 8 Rob. (La.), 482; Edwards vs. Baltimore Ins. Co., 3 Gill. (Md.), 176.

d. Proofs must be furnished in the form called for.

Phoenix Ins. Co. vs. Taylor, 5 Minn., 492; Germania F. Ins. Co. vs. Curran, 8 Kan., 9.

c. But if no specific form be required, it is sufficient that the proofs furnish satisfactory evidence of the loss.

Walsh vs. Washington Marine Ins. Co., 32 N. Y., 427; Taylor vs. Ins. Co., 13 Gray (Mass.), 434.

f. Proofs should be made when possible by the insured or if unable, by his authorized representative, but they also may be made by the real party in interest, to whom the loss is payable with the consent of the insurers. In the absence of the insured, proofs may be made by any party who might naturally be authorized to represent him—but proofs made by one having no authority are not sufficient.

Kernochan vs. N. Y. Bowery Ins. Co., 17 N. Y., 428; Keeler vs. Niagara Fire Ins. Co., 16 Wis., 532; Ayres vs. Hartford Ins. Co., 17 Iowa, 176; Pratt vs. N. Y. Central Ins. Co., 55 N. Y., 505; Walker vs. Ins. Co., 57 Me., 281; Frost vs. Ins. Co., 5 Den. (N. Y.), 64.

g. Compliance with requirements as to proofs of loss may be waived, either in whole or in part, by such conduct on the part of the insurer as shall justify the belief on the part of the insured that compliance is not necessary, or is sufficient.

Charlestown Ins. Co. vs. Neve, 2 McMillan, S. C., 237; Post vs. Aetna Ins. Co., 43 Barb. (N. Y.), 351; Aetna Ins. Co. vs. Tyler, 16 Wend. (N. Y.), 85; O'Neil vs. Buffalo Fire Ins. Co., 3 Comst. (N. Y.), 122.

h. Denial of liability exclusively on other grounds, is a waiver of proofs. Heath vs. Franklin Ins. Co., 1 Cush. (Mass.), 257; Tayloe vs. Merchants' Ins. Co., 9 How. (U. S.), 890; Cousin vs. Ins. Co., 46 Penn., 323.

i. Specification of certain defects in the proofs is a waiver of others not specified.

Phillips vs. Protection Ins. Co., 14 Mo., 220.

j. The insurers must act in good faith in order to avail themselves of a violation of the conditions.

Patrick vs. Farmers' Ins. Co., 43 N. H., 621; Charleston Ins. Co. vs. Neve, *supra*; Clark vs. N. E. Ins. Co., 6 Cush. (Mass.), 342; Cornell vs. Le Roy, 9 Wend. (N. Y.), 163.

k. The particular account of the loss must be as full as the circumstances require, in order that the insurers may estimate the amount.

Catlin vs. Springfield Ins. Co., 1 Sumner, 434.

l. But when no particular account is required, a general statement of the loss will usually be sufficient.

Lycoming Ins. Co. vs. Scholenberger, 34 Penn. St., 259.

m. Strict compliance will be excused where impossible.

Hynds vs. Schenectady Ins. Co., 11 N. Y., 554; Norton vs. Rensselaer Ins. Co., 7 Cow. (N. Y.), 645.

n. Proofs are not evidence against the insurer of the amount of loss, but only of compliance with the condition, but they may be used to prove fraud on the part of insured.

Commercial Ins. Co. vs. Sennett, 41 Penn. St., 161; Lafayette Ins. Co. vs. Winslow, 56 Ill., 219; Howard vs. City Ins. Co., 4 Den. (N. Y.), 502.

o. Objections to the sufficiency of proofs, must be specifically indicated, and their acceptance without such objections is a waiver.

Walker vs. Metropolitan Ins. Co., 56 Me., 371; Home Ins. Co. vs. Cohen, 20 Gratt. (Va.), 312; Boynton vs. Clinton Ins. Co., 16 Barb. (N. Y.), 254; Hynds vs. Schenectady Ins. Co., 11

N. Y., 554; *Priest vs. Citizens' Ins. Co.*, 3 Allen (Mass.), 604; *Pratt vs. N. Y. Central Ins. Co.*, 55 N. Y., 505.

p. A waiver of notice is not a waiver of preliminary proofs.

De Silver vs. Ins. Co., 3 Penn. St., 13.

q. Mere silence on the part of the company, however, when it is not bound to speak, or conduct not calculated to mislead the insured, cannot be construed as a waiver.

Franklin Ins. Co. vs. Chicago Ice Co., 36 Md., 102; *Savage vs. Corn Exchange Ins. Co.*, 4 Bos. (N. Y.), 1.

r. Objections not made within a reasonable time, personal investigation of the amount of loss, and negotiations for a settlement, are waiver of proofs.

Ætna Ins. Co. vs. Tyler, 16 Wend. (N. Y.), 358; *Gt. Western Ins. Co. vs. Staaden*, 26 Ill., 305; *Bodle vs. Chenango Co. Ins. Co.*, 2 N. Y., 53; *Johnson vs. Columbia Ins. Co.*, 7 Johns (N. Y.), 315.

s. The burden is on the insured to show inability to furnish such proofs as are required by the policy.

O'Brien vs. Com. Ins. Co., 63 N. Y., 111.

t. The proofs are not necessarily conclusive against the insured. In case of mistake, such error in the proofs may be shown.

Ætna Ins. Co. vs. Stevens, 48 Ill., 31; *McMasters vs. Ins. Co. of N. A.*, 55 N. Y., 222.

u. The insured is not bound to procure documents from other parties not within his control, in case his vouchers and books of account are lost; nor is he bound to keep books of account.

Mech. F. Ins. Co. vs. Nicola, 1 Harrison, N. J., 410; *Wightman vs. West. M. & F. Ins. Co.*, 8 Rob. (La.), 442.

r. The certificate of the nearest magistrate must be furnished if required, and his refusal to grant it has been held fatal, but distances will not be nicely calculated, a substantial compliance is enough; the magistrate must be qualified to grant it.

Longhurst vs. Conway Ins. Co., U. S. D. C., Ind.; *Peoria M. & F. Ins. Co. vs. Whitehill*, 25 Ill., 466; *Ætna F. Ins. Co. vs. Miers*, 5 Sneed. (Tenn.), 139; *Noonan vs. Hartford F. Ins. Co.*, 21 Mo., 81.

See further on this subject under NOTICE, POLICY, WAIVER.

DIGEST OF RECENT CASES.

PROOFS OF LOSS—WHAT IS IN TIME.

1. The policy provided that in case of loss "the insured shall give immediate notice thereof in writing, and shall render to the company a particular account of said loss in writing." Also that payment should be made sixty days "after due notice and proofs" made by the insured were received at the company's office. *Held*,

that it was the apparent intention that notice and proofs should be rendered at the same time, and the word "immediate" must be liberally construed. It is enough that due diligence, without any unnecessary delay, was used.

Peoria Marine and Fire Ins. Co. vs. Lewis, 18 Ill., 553.

The plaintiff's property, a large manufacturing business, was destroyed by the great Chicago fire, which also swept away defendant's office. Time was absolutely necessary to comply with the requirements. The goods were burned on the 8th or 9th of October, and an inventory made out and presented to the company on the 13th of November. *Held*, that this was due diligence under the circumstances. Whether due diligence has been used may be ordinarily regarded as a question of fact for the jury, but where there is no dispute as to the facts or circumstances, it may be regarded as a question of law.

Edwards vs. Balt. Ins. Co., 3 Gill. (Md.), 176; *Kemble vs. Howard Fire Ins. Co.*, 8 Gray, 33.

Knickerbocker Ins. Co. vs. Gould, Ill. S. C., 5 Ins. Law Jour., 789.

2. The policy required that a particular account of the loss should be rendered as soon as possible. *Held*, that the requirement of proofs of loss "soon as possible," did not mean instantly or directly, but simply within a reasonable time under the circumstances.

Duncan vs. Topham, 8 Man., Gr. & Scott, 229 and note; *Waterman vs. Dutton et al.*, 6 Wis., 265; *Hall et al. vs. Delaplaine et al.*, 5 Wis., 206.

Where the company received such proofs, made out within four months after the fire, with the assistance of the agent, without objection, and raised the objection for the first time in defending a suit on the policy, it is estopped from claiming that they were furnished too late.

Killips vs. Putnam Fire Ins. Co., 28 Wis., 472; *O'Connor vs. Hartford Fire Ins. Co.*, 31 Wis., 161. *Case of Blossom vs. Lycoming Fire Ins. Co.*, 64 N. Y., 166, distinguished.

Palmer vs. St. Paul F. and M. Ins. Co., Wis. S. C., 44 Wis., 201; 7 Ins. Law Jour., 667.

3. A notice to defendant stating the destruction of the property and enumerating the companies insuring, itself among the

number, signed by a party whose relationship did not appear, but who proved to have been guardian for plaintiff mortgagee to whom loss was payable, was sufficient. The fire occurred on the 8th of March, the proofs of loss were prepared by an insurance agent and embraced many items; the affidavit was sworn to on the 18th of April, and the proofs were not served until the 16th of May. The alleged ground of the delay was the desire of the agent, as a business man, to satisfy himself that they were correct. *Held*, that it could not be said, as a matter of law, that they were not served as soon as possible; the question was one of fact. The lapse of time was a proper matter for consideration, but was not conclusive of unreasonable delay.

O'Brien vs. Phoenix F. Ins. Co., N. Y. C. A., 76 N. Y., 459; 8 Ins. Law Jour., 517.

4. Where a clause in a policy of insurance requires the assured, in case of loss, to "give immediate notice thereof in writing," and "render to the company a particular account of said loss, in writing," and the policy further provides that payment shall be made in sixty days after *due notice* and proofs of the loss, a liberal construction should be given to the words used, and it will be held to require notice and proofs to be given within a reasonable time after the loss. Where a loss occurred on the 8th or 9th of October, and notice and proofs of loss were given on November 13th following, it appearing that the office of the insurance company was also destroyed, so that the insured did not know where to find its officers, and the conflagration was so general as to suspend all business transactions, and the insured held many other policies under which he sustained losses, it was *Held*, that the court could not say the delay, under the circumstances, was unreasonable. Where there is no dispute as to the facts of the case, it is a question of law whether due diligence has been used in giving notice of a loss; but where the facts in regard to diligence are disputed, it is a question of fact for the jury, and it is proper to submit to the jury whether, under all the circumstances, immediate notice was given. Where a defective notice and proof of loss is given to an insurance company, and no defects are pointed out, so as to afford an opportunity to correct the same, objection to the same

will be considered as waived, but not so where the notice is not given in time. The retaining of the notice, and making no objection, is not a waiver of the failure to give the same in time. The proofs of loss furnished an insurance company are admissible in evidence, in an action upon a policy of insurance, to show that such proofs were made and delivered as required by the terms of the policy, but not for the purpose of proving the extent of the loss to the jury—that must be shown by other evidence.

Knickerbocker Ins. Co. vs. Gould, Ill. S. C., 80 Ill. R., 388.

5. The word “immediately” as used in a fire insurance policy which required that proofs of loss should be furnished in writing immediately after the fire means within a reasonable time, and what is a reasonable time must of course depend upon the facts and circumstances of each particular case. Preliminary proofs of loss are required for the benefit solely of the insurer, in order that he may ascertain the nature, extent, and character of the loss, and the condition in the policy in respect thereof being inserted for his benefit, there is no reason why he may not waive or extend the time within which such proofs are to be furnished. Nor is it necessary to prove an express agreement to waive; on the contrary, it may be inferred from the acts and conduct of the insurer inconsistent with an intention to insist upon the strict performance of the condition. Estoppel, as an element in connection with a waiver of preliminary proofs of loss, means where the insurer, knowing that the proofs have not been furnished within time, so bears himself thereafter, in relation to the contract, as fairly to lead the assured to believe that he still recognizes the policy to be in force and binding upon him. A clause in a fire insurance policy that provided “no waiver or modification of any of the terms or conditions of this policy shall be made in any event,” referred to those conditions and provisions of the policy which entered into and formed a part of the contract of insurance, and were essential to make it a binding contract between the parties; and which were properly designated conditions, and it had no reference to those stipulations which were to be performed after a loss had occurred, such as giving notice and furnishing proofs of loss.

Rokes vs. Amazon Ins. Co., Md. S. C., 51 Md., 512.

6. Where the owner is absent or cannot from his own knowledge make statement of the particulars of the loss, and the property is under the custody of the agent, proofs by the latter are sufficient compliance with the policy. A specification of certain formal defects in the proofs is a waiver of objections to those not mentioned and to objections as to time.

Hicks vs. Empire F. Ins. Co., St. Louis (Mo.) C. A.

WHAT IS NOT IN TIME.

7. The policy required that the insured should "as soon after as possible," furnish proofs of loss, etc. *Held*, that the company might not do anything to induce delay or neglect on the part of the insured and then claim advantage from its own act, but it could keep silent and not speak, and if they were not furnished in time it would be absolved from liability.

Underwood vs. Farmers' Joint Stock Ins. Co., 57 N. Y., 500; Bumstead vs. Div. Mut. Ins. Co., 12 N. Y., 81; Worsley vs. Wood, 6 T. R., 710.

Held, that the words, "as soon after as possible," are not to be literally construed; they must have a reasonable construction and require that the proofs should be furnished with reasonable diligence, all the circumstances considered. What would be a reasonable time, where the facts are undisputed, is a question of law for the court.

Inman vs. Western Ins. Co., 12 Wend., 452; Trask vs. Ins. Co., 29 Pa., 198; Craig vs. Parkes, 40 N. Y., 181; Bennett vs. Lycoming Ins. Co., N. Y. C. A., 6 Ins. L. J., 189.

But in case of evidence tending to show obstacles in the way, and reasonable diligence in overcoming them, it is a question of mixed law and fact for the jury under instructions. A special agent was sent to examine into the loss, who declared to the insured after an investigation that there was fraud, and it was questionable whether they did not fire the store. Subsequently the insured met the general agent, who stated that he was informed that there was fraud, that the building was fired, and the loss overestimated, but payment was neither demanded nor refused, nor any reference made to proofs of loss. Subsequently on the 16th of February, proofs were presented at the home office, and

payment was demanded, which was refused solely on the ground of fraud. The fire occurred in November and the proofs were completed on the 8th of January; no reason for the delay in their presentation was offered. *Held*, that the suspicions expressed should have made the insured scrupulously exact to comply with the policy requirements. *Held*, that the refusal of payment solely on the ground of fraud was not a waiver of the defense that the proofs had not been furnished within a reasonable time. The insured had lost all rights under the policy by an unreasonable delay, and the company might refuse to pay for no reason at all, or for one out of many reasons.

Diehl vs. Adams Co. Mut. Ins. Co., 58 Penn., 452; *Trask vs. Ins. Co.*, 29 Pa., 198; *Patrick vs. Ins. Co.*, 43 N. H., 621; *Beatty vs. Ins. Co.*, 66 Pa., 9; *Underwood vs. Farmers' Joint Stock Ins. Co.*, *supra*; *Bennett vs. Lycoming Ins. Co.*, *supra*.

Brink et al. vs. Hanover F. Ins. Co., N. Y. C. A., 70 N. Y., 593; 6 *Ins. Law Jour.*, 707.

WHAT IS SUFFICIENT COMPLIANCE.

8. The agent of the company was present at the fire and aided the insured to open the safe and secure the contents after the fire; notice of the event was immediately sent to the company, and an agent was sent in from 7 to 9 days, who took preliminary proofs of loss, with which he appeared to be satisfied, and required nothing further. *Held*, that this was sufficient compliance with a requirement to furnish preliminary proofs within a reasonable time.

Kennedy vs. Home Ins. Co. et al., Tenn. S. C., 6 *Ins. Law Jour.*, 359.

9. A defense alleging that proper proofs of loss have not been furnished in that the property was held in trust by the plaintiff, who was insured as the sole owner under a policy stipulation that if his interest was otherwise, it must be so represented or the policy would be void, is not simply a plea in abatement, but in bar. Where the insured property was an organ, and the company persistently demanded a schedule in the proofs, but not a

PROOF OF 1955

1. The first part of the proof is to show that the function $f(x)$ is continuous at $x = a$.

Let $\epsilon > 0$.

Then there exists a $\delta > 0$ such that

if $|x - a| < \delta$ then $|f(x) - f(a)| < \epsilon$.

Since ϵ is arbitrary, this shows that $f(x)$ is continuous at $x = a$.

Now we show that $f(x)$ is differentiable at $x = a$.

Let $h \neq 0$ be such that $a + h$ is in the domain of f .

Then we have

$$\frac{f(a+h) - f(a)}{h} = \frac{f(a+h) - f(a)}{h}.$$

Since $f(x)$ is continuous at $x = a$, we have

$$\lim_{h \rightarrow 0} \frac{f(a+h) - f(a)}{h} = \lim_{h \rightarrow 0} \frac{f(a+h) - f(a)}{h}.$$

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Since $f(x)$ is continuous at $x = a$, we have

are not erroneous, but contain a clear statement of the law of the case at bar under the facts disclosed by the record.

Wm. Ins. Co. vs. Stanton, Ga. S. C., 9 Ins. Law Jour., 6.

The insurance company alleged that the plaintiff's proof of loss did not contain a particular account thereof. The property insured was a frame dwelling-house; the account of loss was, that the property insured was totally destroyed by fire. *Held*, that the account under the circumstances could not have been more particular, and at all events it was prima facie sufficient, and if the schedules and papers annexed to the affidavit of loss were sufficient, it was incumbent upon the defendant to produce the same.

Hendler vs. Commerce Fire Ins. Co. of N. Y., Pa. S. C., 88 Ins., 224.

The policy insured the owner and stipulated for payment of proofs of loss by insured. A paper attached and made part of the policy provided that it was an insurance of mortgagee's interest only, and should not be avoided by acts of the owner; that notice and proofs should be furnished by the parties sustaining loss. *Held*, that the owner was not obliged to make proofs, they could be made by mortgagee. *Held*, that a refusal to recognize the policy as in force was a waiver of objection to defective proofs.

Graham vs. Firemen's Ins. Co., N. Y. C. P.

WHAT IS A WAIVER OF.

13. A refusal by agent to accept proofs of loss on the ground of no liability, estops the company from making any formal objection to them. Had the proofs been insufficient it was the duty of the agent to make objection at once, so that the insured could supply the defect.

Lycoming Ins. Co. vs. Dunmore, Ill. S. C., 5 Ins. Law Jour., 93.

14. A company may waive strict compliance with a requirement regarding proofs of loss, either by express terms or by a

full description or specifications, the demand was sufficiently complied with by naming the article, and an objection to the sufficiency of the proofs was not well taken.

Smith vs. Commonwealth Ins. Co., Wis. S. C., 49 Wis. 322; 9 Ins. Law Jour., 652.

10. An amendment to a declaration on a policy of insurance to the effect that the insurance company absolutely declined to pay the loss stipulated for by the policy, and thereby waived the preliminary proof provided for, on general demurrer to the declaration as amended, will be held to mean that the absolute refusal to pay was within the sixty days limited for such preliminary proof, as no subsequent refusal would work such waiver, and the demurrer was properly overruled. Charges of the court that the production in evidence of the policy together with proof that the plaintiff was owner of the property insured; that the property was destroyed and lost *bona fide* by fire, within the time limited in the policy, with satisfactory proof of its value, and of compliance with all the conditions required on the happening of loss, or a waiver of the same, would, in the absence of a defense, entitle the plaintiff to a recovery, and if the plaintiff's case fails in any of the particulars, she cannot recover; and that every insurer has the right to prescribe regulations as to notice and preliminary proof of loss, which must be substantially complied with by the assured, provided the same are made known at the time of the insurance, and are not materially changed during the existence of the contract, but that an absolute refusal to pay waives a compliance with these preliminaries; and that if the loss occurred, and the defendant, or its authorized agent, had notice of the fact, and he viewed the premises, and appraisal was agreed on or had, and the matter discussed and papers prepared or presented relative to the loss, and these negotiations were terminated by an unconditional announcement from the defendant, or its agent, to the other party that defendant would not pay because of defect of title or some point relative to assignment of the policy, and making no allusion to any other objection, this would amount to the absolute refusal to pay meant by the law, and would be a waiver by defendant of all conditions as to notice and preliminary proof of

loss ; are not erroneous, but contain a clear statement of the law of the case at bar under the facts disclosed by the record.

Ætna Ins. Co. vs. Stanton, Ga. S. C., 9 Ins. Law Jour., 6.

11. The insurance company alleged that the plaintiff's proof of loss did not contain a particular account thereof. The property insured was a frame dwelling-house ; the account of loss was, that the property insured was totally destroyed by fire. *Held*, that this account under the circumstances could not have been more particular, and at all events it was prima facie sufficient, and if the schedules and papers annexed to the affidavit of loss were insufficient, it was incumbent upon the defendant to produce them.

Chandler vs. Commerce Fire Ins. Co. of N. Y., Pa. S. C., 88 Penn., 224.

12. The policy insured the owner and stipulated for payment after proofs of loss by insured. A paper attached and made part of the policy provided that it was an insurance of mortgagee's interest only, and should not be avoided by acts of the owner ; also that notice and proofs should be furnished by the parties sustaining loss. *Held*, that the owner was not obliged to make proofs, they could be made by mortgagee. *Held*, that a refusal to recognize the policy as in force was a waiver of objection to defective proofs.

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Lycoming Ins. Co. vs. Dunmore, Ill. S. C., 5 Ins. Law Jour., 93.

14. A company may waive strict compliance with a requirement regarding proofs of loss, either by express terms or by a

course of conduct calculated to throw the insured off his guard, as by basing a refusal to pay upon some other and distinct ground.

Hibernia Ins. Co. vs. O'Conner, 29 Mich., 241.

Where the policy does not declare the effect of a failure to furnish proofs within the required time, while it expressly provides that a violation of its other provisions will work a forfeiture, it is questionable whether a failure as to proofs of loss would deprive the insured of his rights.

Aurora F. & M. Ins. Co. vs. Kranich, Mich. S. C., 36 Mich., 289; 6 *Ins. Law Jour.*, 676.

15. Where a fire insurance policy provides that the loss shall not be payable until the expiration of a specified time after the proofs of loss have been furnished, the furnishing of such proofs (if not waived) is a condition precedent to the right of action, and in an action on the policy, an averment in the answer that such proofs were not furnished for the specified length of time before the action was brought, does not create an issue in abatement which must be tried before the other issues in bar. In such an action, an answer showing that plaintiff furnished what purported to be proof of loss, and that these were not accepted as a compliance with the terms of the policy, but that "defendant at once denied that any liability to plaintiffs had arisen under said alleged policy, and refused to pay any alleged claim thereunder; *Held* to show a denial of liability in any event, and an unqualified refusal to pay the loss; which was a waiver of such proofs.

Harriman et al. vs. Queen Ins. Co., Wis. S. C., 49 Wis., 71.

16. A State law required the agent of the company from another State, to have authority from the parent office to settle losses without the interference of the officers. *Held*, that the agent could waive the presentation of preliminary proofs, and such waiver was binding on the principal.

Franklin Fire Ins. Co. vs. Chicago Ice Co., 35 Md., 102.

Such waiver can be proved by indirect circumstances as well as by direct testimony.

Home Ins. Co. vs. Baltimore Warehouse Co., U. S. S. C., 3 Otto, 527; 6 *Ins. Law Jour.*, 739.

17. Where the proofs of loss were submitted to the secretary, and indeed made out under his direction, and when returned he did not object because a notary's certificate was not attached, but proceeded to adjust the loss to his own satisfaction, this was a waiver of the policy requirements that notice must be given of other insurance, and that proofs of loss must be accompanied with a notary's certificate.

Levy vs. Peabody Ins. Co., W. Va. S. C. A., 10 W. Va., 560 ; 6 Ins. Law Jour., 769.

18. Objection to the sufficiency of proofs of loss furnished by the insured, must be made with reasonable promptitude, that they may be perfected if possible. Where the proofs were accepted by the agent as apparently satisfactory, on the 12th of June, and no objections to their sufficiency were made until the 21st of August following, it was too late.

Young vs. Hartford Fire Ins. Co., Iowa S. C., 45 Iowa, 377 ; 6 Ins. Law Jour., 549.

19. Where the company set up, among other grounds of defense, that the insured failed to furnish preliminary proofs within the time and in the manner prescribed ; *Held*, that such defense was not waived by also setting up and relying upon other defenses not inconsistent therewith.

Home Ins. Co. vs. Lindsey, 26 Ohio St., 348.

Farmers' Ins. Co. vs. Frick, Ohio S. C., 29 O., 466 ; 6 Ins. Law Jour., 462.

20. A delay in objecting to formal defects in the preliminary proofs under the condition of a policy of insurance, which might be obviated in time to preserve the right of action if made promptly, is evidence of a waiver of such defects.

Jones vs. Mechanics' Ins. Co., 7 Vroom, 29 ; State Ins. Co. vs. Maakens, Vroom, 564 ; Basch vs. Humboldt Ins. Co., 6 Vroom, 429 ; Taylor vs. Roge Williams Ins. Co., 51 N. H., 50.

There was a delay from December 15, 1874, to January 30, 1875, in making a return of the proofs with notice of defects. At that time it was too late to complete the proofs and retain the right of action under the policy. The company had sixty days

after the proofs were furnished to make payment of the loss, and the suit was required to be brought in twelve months after the loss. This time expired February 13, 1875, the day on which the action was brought. *Held*, that the delay was unreasonable, and a waiver of the defects.

Hibernia Mut. F. Ins. Co. vs. Meyer, N. J. C. E., 39 N. J., 482; 6 Ins. Law Jour., 699.

21. Where the agent of defendant refused to accept proofs of loss on the ground that there was no contract, it was a waiver of the production of preliminary proofs.

Flanders on Fire Ins., 541.

Akin vs. L., L. & G. Ins. Co., U. S. S. C., 6 Ins. Law Jour., 341.

22. Immediately after the loss, the company, in conjunction with others interested, sent appraisers, who made the requisite examination and reported. The company being dissatisfied, made a second appraisal and tendered the amount estimated. This being refused, plaintiffs were informed that the company would rebuild. The company's secretary also advised plaintiff's representative to defer making out proofs of loss until the matter was adjusted. *Held*, that this was a waiver of the condition in the policy requiring proofs of loss to be furnished within thirty days.

Inland Ins. Co. vs. Stanffer, 9 Casey, 397; Heath vs. Ins. Co., 1 Cush., 257; Clark vs. Ins. Co., 6 ib., 342; Francis vs. Ins. Co., 1 Dutcher (N. J.), 78; Buckley vs. Garrett, 11 Wright, 204; Ins. Co. vs. Taylor, 23 P. F. Smith, 343.

State Ins. Co. of Mo. vs. Todd, Pa. S. C., 83 Pa., 212; 6 Ins. Law Jour., 893.

23. Obligations of the assured to furnish proof of loss in the required form, and a certificate of the notary public in regard to the loss, will not be strictly enforced when the company has not acted with all good faith toward the insured, and has deceived him into a sense of false security. They must object to formal defects in time to give the assured an opportunity to supply the defects. Objections on other grounds, having no reference to such defects, is a waiver of a right to object on this ground.

May on Ins., 573.

Mason vs. Citizens' F. & M. Ins. Co., W. Va. S. C. A., 10 W. Va., 572; 6 Ins. Law Jour., 842.

24. A letter from the president, objecting to payment of the loss on other grounds, is a waiver of objections to the insufficiency of preliminary proofs.

Post vs. Ætna Ins. Co., 43 Barb., 357; *Peoria Ins. Co. vs. Whitehill*, 25 Ill., 466.

An allegation of compliance with the condition regarding preliminary proofs, is supported by proof that the underwriters waived the condition.

2 Phillips, sec. 2, 122; *Pim vs. Reed*, 6 Mann. & G., 1.

Atlantic Ins. Co. vs. Manning, Col. S. C., 7 *Ins. Law Jour.*, 157.

25. After the damages had been appraised by mutual agreement, proofs of loss were duly served on the company and retained without objection for thirty-eight days. *Held*, that this was a waiver of any subsequent objection to the sufficiency of the proofs. The insured was not obligated to afterward furnish supplementary proofs and thereafter produce his books for examination, where by the terms of the policy his right of action would not accrue until sixty days after serving proofs.

Kecney vs. Home Ins. Co. of Columbus, N. Y. C. A., 7 *Ins. Law Jour.*, 108.

26. There must be substantial compliance with the terms of the policy in furnishing preliminary proofs, unless such compliance is waived. But a denial of liability solely on other grounds was a waiver of defective proofs, if made by one having power to bind the company.

Blake vs. Exchange Mutual Ins. Co., 12 Gray, 270; *Franklin Fire Ins. Co. vs. Coates & Glenn*, 14 Md., 293; *Charleston Ins. & Trust Co. vs. Neve*, 2 McMullen, S. C., 237; *St. Louis Ins. Co. vs. Kyle*, 11 Mo., 278; *Taylor vs. Merchants' Ins. Co.*, 9 Howard, U. S., 390; *Hartford Pro. Ins. Co. vs. Harmer*, 2 Ohio St., 451; *Noyes vs. Washington County Ins. Co.*, 30 Vt., 659; *Peoria Marine & Fire Ins. Co. vs. Whitehall*, 25 Ill., 470; *Vos vs. Robinson*, 9 Johns., 192; *Commonwealth Ins. Co. vs. Sennett et al.*, 41 Penna., 162.

Hartford F. Ins. Co. vs. Smith & Doll, Col. S. C., 7 *Ins. Law Jour.*, 140.

27. General agents charged with the duty of settling a loss, have power to dispense with stipulations for the benefit of the

company as to the mode of ascertaining the liability and limiting the right of action.

Eastern Railroad vs. Relief Ins. Co., 105 Mass., 570; *Kennebec Co. vs. Augusta Ins. Co.*, 6 Gray, 204; *Gloucester Manufacturing Co. vs. Howard Ins. Co.*, 5 Gray, 497.

A general refusal to pay, followed by negotiations for a settlement without objection to the form of proofs of loss, is a waiver of such objection, and the rule is equally applicable to mutual companies.

Graves vs. Washington Ins. Co., 12 Allen, 391; *Heath vs. Franklin Ins. Co.*, 5 Cush., 258; *Eastern Railroad vs. Relief Ins. Co.*, 105 Mass., 570; *Underhill vs. Agawam Mutual Ins. Co.*, 6 Cush., 440; *Brewer vs. Chelsea Mutual Ins. Co.*, 14 Gray, 203; *Priest vs. Citizens' Mutual Ins. Co.*, 4 Allen, 605; *Blake vs. Exchange Mutual Ins. Co.*, 12 Gray, 265.

Little vs. Phœnix Ins. Co., Mass. S. J. C., 123 Mass., 380; 7 *Ins. Law Jour.*, 481.

28. A declaration of the agent and adjuster showing a determination on the part of the company not to pay, rendered notice and proof of loss unnecessary.

Germania Fire Ins. Co. vs. Casteel, Ill. S. C., 7 *Ins. Law Jour.*, 253.

29. An agreement by the insurer with the assured, after a loss, to submit the amount thereof to arbitration, is a waiver of the objection that "proofs of loss" were not furnished as required by the policy.

Bammessel vs. Brewers' Fire Ins. Co., Wis. S. C., 43 Wis., 463; 7 *Ins. Law Jour.*, 767.

30. The policy required immediate notice, and as soon as possible proofs of loss. The local agent was notified, who informed the company, and its adjuster was sent. The adjuster told the insured to go before a justice and make proofs, and made propositions to settle which were not accepted. Finally he left the insured, saying he had not time to attend to the business then, and left a proposition to pay a certain sum which was not then accepted, and was afterward withdrawn. Some time afterward the assured called on the local agent to accept the last proposition, and was then informed that it was withdrawn. *Held*, that this might have been a waiver of time, and justified delay, but it was

not a waiver of the requirement. When informed of the withdrawal of the last offer, the adjuster not having returned, it was the duty of the assured then to have complied with the condition. Not having done so, he has no ground of action.

Warner vs. Ins. Co. of North America, Pa. S. C., 7 Ins. Law Jour., 628.

31. Failure to require exact proofs of loss, and reliance on non-payment of premium, are waiver of such proofs.

Phoenix Ins. Co. vs. Stevenson, 78 Ky.

Continental Ins. Co. vs. Randolph, Ky. C. A., 10 Ins. Law Jour., 387.

32. After a refusal by a competent officer of an insurance company to pay a loss, on the ground that the policy had been forfeited for non-payment of assessments, it is not necessary for the assured to make formal proofs of loss.

Ins. Co. vs. Stauffer, 9 Casey, 397; Ins. Co. vs. Sennett, 5 Wr., 161; Coursin vs. Ins. Co., 10 ib., 323; Buckley vs. Garrett, 11 ib., 204; Ins. Co. vs. Taylor, 23 P. F. S., 343; Ins. Co. vs. Todd, 2 Norris, 272.

Crawford Co. Mut. Ins. Co. vs. Cochran, Pa. S. C., 88 Pa., 230; 8 Ins. Law Jour., 549.

33. Where a fire insurance policy requires that notice and proofs of loss shall be filed in a certain office of the company, but such notice and proof are received at another office of the company without objection, except on the sole ground that the policy was not in force, the condition is waived.

German Ins. Co. vs. Ward, Ill. S. C., 90 Ill., 550; 8 Ins. Law Jour., 607.

34. Erroneous. See page 512, §43, for correct digest.

35. A full examination of insured by the agent, touching the loss, though not under oath, and a schedule of such loss made by the agent, are a waiver of the policy stipulation requiring a formal notice of the loss. *Query*, whether the mailing of proofs within thirty days after the loss is not a sufficient compli-

ance with the requirement that they should be furnished within thirty days. The policy provided that the claimant "should, within 30 days, render a particular account of such loss * * and shall also produce a certificate, under the hand and seal of the chief of the fire department." *Held*, that the certificate need not be produced within the thirty days, but only within a reasonable time. *Held*, that a specific objection simply, that the certificate was not produced in time, is a waiver of all other objections.

Killips vs. Ins. Co., 28 Wis., 472; O'Connor vs. Ins. Co., 31 Wis., 160.

Badger vs. Glens Falls Ins. Co., Wis. S. C., 49 Wis., 389; 9 Ins. Law Jour., 757.

36. A distinct refusal to pay on the ground that the company is not liable, is a waiver of the policy stipulation concerning notice and proofs of loss.

West Rockingham Mnt. Fire Ins. Co. vs. Sheets & Co., 25 Gratt., 854.

Portsmouth Ins. Co. vs. Reynolds, Va. S. C. A., 9 Ins. Law Jour., 606; Rumsey vs. Phoenix Ins. Co., U. S. C. C. N. Y., 17 Blatch., 527.

37. The policy required notice and formal proofs of loss, and a certificate from a magistrate or notary by the insured, and also that if required he should submit to an examination under oath. *Held*, that a searching examination by an agent of the company under oath, covering all the facts which would be included in the proofs, in the absence of any special demand for such proofs or certificate by the company, was a waiver of the condition requiring them.

Priest vs. Ins. Co., 3 Allen, 602; Wyman vs. Ins. Co., 1 Allen, 301, 304; Security Ins. Co. vs. Tay, 22 Mich., 467.

The policy stipulated that the loss should be payable sixty days after proofs of loss were furnished to the company. *Held*, that the sixty days began to run from the close of the examination, and the delivery of the examination signed by assured to the agent who retained it, was a waiver of its delivery at the office of the company. An action commenced at the end of the sixty days was not prematurely brought.

Killips vs. Ins. Co., 28 Wis., 472; Warner vs. Ins. Co., 14 Wis., 319; O'Con-

nor vs. Ins. Co., 31 Wis., 160; McBride vs. Ins. Co., 30 Wis., 562, 568; Bammessell vs. Ins. Co., 43 Wis., 463.

Badger vs. Phoenix Ins. Co., Wis. S. C., 49 Wis., 396; 9 Ins. Law Jour., 627.

38. The company objected that the certificate of the magistrate in the proofs was not that of the one nearest the fire as required. *Held*, that the law is well settled that when any defects are found in the proofs of loss, capable of being remedied, if intelligibly pointed out, a failure by the underwriters to make known the difficulty, or to call for the information omitted, when that is the infirmity, within a reasonable time, is deemed to be a waiver, and the rule is believed to be without exception that the insurer must object seasonably if at all. He must act in good faith, openly, frankly and distinctly, and make his objections known within a reasonable time, and whether he has done so or not in a given case is a question for the jury. A company may not delay until it is too late to amend them within the time limited for bringing suit and object to their sufficiency; such delay is a waiver of objection.

Mercantile Ins. Co. vs. Holthouse, Mich. S. C., 9 Ins. Law Jour., 535.

39. A forfeiture for failure to furnish proofs within a specified time, may be waived by proof of an express waiver, or by acts or conduct from which an intention to waive is expressly inferable.

Goodwin vs. Mass. Mut. Life Ins. Co., 73 N. Y., 430; Prentice vs. Knickerbocker Life Ins. Co., 8 Ins. L. J., 708.

The filing of proofs of loss by a specified time, is a condition made for the benefit of the company which it may avail itself of or not, and if it determines to waive it, it cannot afterward recall the waiver, and insist upon the forfeiture. Condition that the proofs of loss should be filed as soon as possible after the fire, means that they must be filed within a reasonable time under the circumstances presented, and with reference to the obstacles and difficulties to be overcome. Where, although a considerable period elapsed before they were filed, the company received them without objection not only, but retained them, examined the insured in respect to them, and decided not to pay the loss

upon the ground of fraud, and so declared to the assured, and, after failing to prove the charge upon which it relied, then sought to raise the question of the time of filing the proofs of loss, it will be estopped from so doing. Where the evidence showed that a delay in filing proofs was justified by the difficulty of correctly making them, such delay is not unreasonable. A witness was asked, "So far as you could individually, did you get those proofs of loss forwarded as soon as it was possible for you to do so?" The answer was, "I did all in my power to have them forwarded at the earliest possible moment." *Held*, that the objection that it is not competent to testify to a conclusion of fact for the jury does not lie. Where the fact of diligence might be left uncertain from the other facts stated it is not error to allow such a question.

Carpenter vs. Eastern Transf. Co., 71 N. Y., 580, distinguished.

Brink vs. Hanover F. Ins. Co., N. Y. C. A., 80 N. Y., 108, 9 *Ins. Law Jour.*, 342.

40. When proofs of loss are made out and delivered to an insurance company within the time prescribed by the policy, it is its duty to point out specifically any objection it may have to the proofs as made out. Good faith and fair dealing require this to be done, and if it is not done, the company cannot afterward be heard to make objections. It is estopped from doing so. And, if upon making out proofs of loss, the company make certain specified objections, it thereby waives all other objections. If the insurance company after proofs have been made out, refuse to pay a part or the whole of the assured's claim, basing its refusal upon some other distinct ground, it will be estopped when sued on account of the loss, from setting up as a defense that the proofs of loss were insufficient.

Great Western Ins. Co. vs. Staaden, 26 Ill., 365; *Ins. Co. of North America vs. Hope*, 58 Ill., 75; *Winnesheik Ins. Co. vs. Schuyler*, 60 Ill., 465; *Lycoming Fire Ins. Co. vs. Dunmore*, 75 Ill., 14.

Phœnix Ins. Co. vs. Tucker, Ill. S. C., 92 Ill., 64; 9 *Ins. Law Jour.*, 193.

41. The policy in a mutual company was made subject to the regulations in the charter and by-laws, which provided among

other things that any fraud or false swearing with fraudulent intent, in making proofs of loss, should work a forfeiture. The insurance was on contents and the proofs included property belonging to the daughters and son-in-law of insured. There was evidence tending to show that the secretary had told insured all the property would be covered. The policy provided that its conditions should not be waived without the concurrence of the secretary indorsed thereon or otherwise specifically acknowledged. *Held*, that if the secretary signed orders on the company in settlement with a knowledge of the facts, this was a waiver of the provision concerning forfeiture. *Held*, that if the articles were included in the proofs in good faith, the policy was not forfeited.

Citing *Van Buren vs. St. Joseph, etc., Ins. Co.*, 28 Mich., 398.

• *Held*, that a finding for plaintiff less the value of the articles improperly included, should be sustained.

Farmers' Mut. F. Ins. Co. vs. Gargett, et al., Mich. S. C., 42 Mich., 289; 9 Ins. Law Jour., 108.

42. A policy required immediate notice, and proof of loss within thirty days; the notice was given and a protest made out on the day the loss occurred, which was afterwards handed to the insurer's adjuster when he came to investigate the loss, who made the objection that it did not state the cause of the loss, but went on and made a full investigation, after which he told the insured that he did not think the insurer would pay, as he had shown no cause of loss, and that it must have been from unseaworthiness of the boat, or negligence; but promised that after he made his report he would write and inform him whether the insurer would pay; and he reported all the facts, whereupon the insurer decided that he was not liable, and so informed the agents through whom the insurance was affected, without stating the ground of the decision, and the adjuster did not write to the insured as he had promised. *Held*, that a waiver of preliminary proofs may be by direct action of the insurer or by his agent, it may be express or inferred from a denial of obligation by the insurer exclusively for other reasons. A refusal to pay, solely on the ground of unseaworthiness, is a waiver of defective proofs.

Post vs. Aetna Ins. Co., 43 Barb., 351; *Phillips vs. Protection Ins. Co.*, 14 Mo., 220; *Owen vs. Farmers' Joint Stock Ins. Co.*, 57 Barb., 518; *Beatty vs.*

Lycoming Co., M. Ins. Co., 16 P. F. Smith, 9; Globe Ins. Co. vs. Boyle, 21 Ohio St., 119; Wyman vs. People's Eq. Ins. Co., 1 Allen, 301; Peacock vs. Ins. Co., 20 N. Y., 293; Walker vs. Ins. Co., 56 Me., 371; Protection Ins. Co. vs. Harmer, 2 Ohio St., 452.

Held, that whether there had been a waiver of proof of loss by the insured, was properly left to the jury under appropriate instructions. When a vessel is lost by a peril insured against, the insurer will be liable, although the loss might have been avoided by the exercise of proper care on the part of those in charge of the vessel at the time of the loss.

Perrin's adm'r vs. Protection Ins. Co., 11 Ohio, 146; Busk vs. Royal Exchange Assurance Co., 2 B. & Ald., 73; Henderson vs. Western Marine Ins. Co., 10 Rob. (L. A.), 164; Walker vs. Maitland, 5 B. & Ald., 171.

Enterprise Ins. Co. vs. Parisot, Vt. S. C., 35 Ohio, 35; 8 *Ins. Law Jour.*, 897.

43. Where an insurance company sends an agent to adjust a loss, it is estopped to subsequently deny that it had proper notice of the loss, and it is, in the absence of fraud, concluded by the adjustment made by such agent—so in such case there is no ground for the objection, in a suit on the policy, that the assured failed to make proofs of loss as required in the policy. Pending a suit by the insured which was brought in proper time, the company made repeated promises to pay the loss, insisting there was no need of proceeding in the courts to enforce payment. The same promises were made after the then pending suit was dismissed for want of prosecution, the suit having remained on the docket for a year or more. In a suit subsequently brought, but not within the time prescribed in the policy, it was held such promises and declarations were a sufficient excuse for not bringing suit within the prescribed time, or the non-prosecution of a suit properly commenced.

Home Ins. & Banking Co. vs. Meyer, Ill. S. C., 93 Ill., 271.

44. Allegation that the company absolutely declined to pay, and had therefore waived preliminary proof: *Held*, on general demurrer, to mean that refusal was within the 60 days limited for such proof, as no subsequent refusal would work such waiver. Refusal to pay because of defect in title, or of some ground rela-

tive to assignment of policy, is the absolute refusal meant by the law, and would be a waiver as to notice and preliminary proof.

Ætna Ins. Co. vs. Sparks, Ga. S. C., 62 Ga., 187.

PROOFS OF LOSS.

45. A policy provision that service of proofs should be on the Secretary at the home office is waived by service upon the company at another office without objection.

German Ins. Co. vs. Ward, App. Court of Ill., 1st Dist.

WHAT IS NOT A WAIVER OF.

46. Substantial compliance with a policy condition requiring proofs of loss to be furnished within thirty days, is essential to recovery.

Savage vs. Howard Ins. Co., 52 N. Y., 502; Underwood vs. Farmer's J. S. Ins. Co., 57 N. Y., 500.

The casual visit of an adjuster to inquire about the loss, without authority from the company and intimating nothing regarding its liability, was not a waiver of the condition. A letter from the company upon the receipt of proofs some four months after the loss, objecting to its liability because the proofs came too late, and because the claim was fraudulent, was not a waiver. It was error in such a case to submit the question of waiver to the jury.

Blossom vs. Lycoming Fire Ins. Co., N. Y. C. A., 64 N. Y., 62; 5 Ins. Law Jour., 302.

47. Mere silence is not enough to infer waiver of defective proofs, where nothing has been said or done to mislead the insured.

Beatty vs. Lycoming Ins. Co., 16 P. F. Smith, 9.

Southside F. Ins. Co. vs. Mueller, Pa. S. C., 8 Ins. Law Jour., 260.

48. When a policy of insurance so provides, the insured must forthwith, after loss sustained, give notice thereof in writing, and must produce books of account, bills of purchase, or duplicates thereof, and other vouchers to the insurers or their agent. Com-

pliance with the above is indispensable to the insurer's right of action.

O'Brien vs. Commercial Fire Ins. Co., 63 N. Y., 108.

The company offered to compromise on the ground that the claim was excessive, but the insured refused. *Held*, that a letter from the company to the insured, stating that it should contest the claim in its exaggerated shape, under the terms and conditions of the policy, though it would prefer to compromise, was not a waiver of further preliminary proofs.

Farmers' F. Ins. Co. vs. Mispelhorn, Md. C. A., 50 *Md.*, 180; 8 *Ins. Law Jour.*, 378.

49. Proofs of loss should be made within the time required in the policy unless the insurer in some manner waives the right. A letter written by the soliciting agent of the company, on being informed of the loss, to the effect that he would advise the company of the fact, and expected an adjuster would be sent to adjust the loss, cannot be considered as a waiver by the company of the right to demand proper proofs of loss, especially when there is no showing that such agent had authority to act for the company in respect to the loss.

Forrest City Ins. Co. vs. School Directors, etc., Appell. Court of Ill., 8 *Ins. Law Jour.*, 879.

50. Where though the company was chargeable with knowledge that the limitation of time for furnishing proofs had expired, it did not know that the proofs could have been furnished earlier, and proofs were accepted, and afterwards it was stated by an officer that they had been referred, and this action was claimed as a waiver of the policy stipulation: *Held*, that waiver is a thing of intention, and there can be no intention to waive where there is no knowledge. Where a party has an election to adopt one of two inconsistent courses, and takes decisive action with knowledge of his right and the fact, his election is determined and he is estopped. The question of waiver is a mixed one of law and of fact, and it does not become a question of law, except where the facts and circumstances bearing upon it are all admitted.

American Express Co. vs. Triumph Ins. Co., Hamilton Co. (O.) Dist. Court, 5 *Ins. Law Jour.*, 467.

CONSTRUCTION AS TO.

51. The requirement that proofs of loss shall be furnished within a reasonable time, is a condition precedent.

Sibley vs. St. Paul F. & M. Ins. Co., U. S. C. C. Ill., 8 Ins. Law Jour., 461.

52. Where the policy required due proofs of loss, and suit to be commenced within a limited time, these conditions must be substantially complied with. The proofs of loss must show the nature and extent of the insurer's liability upon which the latter may rely.

Irving vs. Excelsior Fire Ins. Co., 1 Bosw., 507.

Where the policy provided that there should be no liability for a loss of less than five per cent, and the proofs as furnished by insured, prior to the trial, claimed damages of less than five per cent. *Held*, that additional damages cannot be shown for the first time upon the trial for the purpose of bringing the loss up to the required amount.

De Grove vs. Metrop. Ins. Co., N. Y. Com. A., 4 Ins. Law Jour., 909.

53. A provision in a policy of insurance that in case of loss the proof of loss "must be made before the nearest magistrate or notary public," should receive a liberal construction. Its object is simply to prevent the assured from selecting the magistrate. A short distance is not material.

Williams vs. Niagara Ins. Co., Iowa S. C., 50 Ia., 561; 9 Ins. Law Jour., 38.

54. The policy stipulated that insured should, if required, submit to an examination under oath, etc. *Held*, that he was not bound to answer questions having no material bearing upon the insurance and the loss. A company cannot, after receiving and retaining proofs without objection, complain of their defects.

Titus vs. Glens Falls Ins. Co., N. Y. C. A., 81 N. Y., 410; 9 Ins. Law Jour., 664.

55. The certificate of a magistrate is a condition precedent to a

suit when the policy stipulates that it shall not be payable until such certificate is produced.

Johnson vs. Phoenix Ins. Co., 111 Mass., 49.

A policy stipulation that the magistrate shall not be concerned in the loss as a creditor, does not disqualify every magistrate who may chance to be a creditor to a trifling amount, but simply one who might be supposed from the fact to have a personal interest in the policy.

Dolliver vs. St. Joseph F. & M. Ins. Co., Mass. S. J. C., 10 *Ins. Law Jour.*, 380.

56. Where a policy of fire insurance upon a stock of goods contains a clause providing that the assured will, if required, produce as part of his proofs of loss certified copies of all bills and invoices, the originals of which have been lost, a failure to comply with the condition will defeat a recovery upon the policy in the absence of proof of waiver or of inability, without fault of the insured, fully to perform. Such a cause does not exact simply copies of the lost originals, but requires at least of the insured, upon the demand of the insurer, duplicates of the invoices of purchases certified by the vendors.

O'Brien vs. C. F. Ins. Co., N. Y. C. A., 63 N. Y., 108.

EVIDENCE RELATING TO.

57. Proofs of loss are competent evidence of a compliance by insured with his covenant and a condition precedent to his right of recovery. But they are not evidence of the quantity and quality of the property lost. A repudiation of the company's liability by the secretary in response to a letter from the insured, notifying of the loss, is a waiver of the requirement of preliminary proof.

Post vs. Aetna Fire Ins. Co., 43 Barb., 351; *Clark vs. Ins. Co.*, 6 Cush., 340.

Planters' Ins. Co. vs. Comfort, Miss. S. C., 50 Miss., 662; 4 *Ins. Law Jour.*, 847.

58. Proofs offered for the purpose of showing a fraudulent overvaluation by plaintiff, are not evidence of a valid loss in favor

of plaintiff, but only of the fact that they were made and delivered to the company.

Brown vs. Clay F. & M. Ins. Co., Mo. S. C.

59. Evidence of a witness in connection with the books of his firm produced in court, to show that though witness had no personal knowledge of the sales charged, yet that the bills had been rendered to plaintiff insured and paid for by him, and that duplicates could have been obtained if applied for, is admissible to prove the ability of the insured to comply with the policy provision requiring such duplicates to be furnished. . An affidavit of the insured made in compliance with the law upon his application for a license to trade upon a specified capital stock, is admissible to show the amount of such stock.

Ins. Co. vs. Weides, 14 Wall., 380.

Where a demand has been made on the insured in accordance with a policy provision, to produce bills of purchase or duplicates, the burden of proof is on the insured to show that it was not in his power to comply, and if it appear that he was able but failed to do so, he cannot recover. An offer of compromise on the part of the agent, is not a waiver of further demand for proofs of loss, unless it appears that the agent had authority or seeming authority to make such an adjustment, and a refusal to give instruction covering only the first point was not error. If an agent has authority to issue and deliver policies, he is presumed to possess power to use all reasonable means to adjust a loss.

Richardson vs. Anderson, 1 Camp., 43.

What is reasonable time within which the company should make known its dissatisfaction with the proofs furnished, and demand duplicate bills of purchase in accordance with the policy stipulation, is a question of law involving the construction of the policy, and not of fact for the jury.

Ragan vs. Gaither, 11 G. & J., 472, 300; Ins. Co. vs. Weides, supra.

Inability to furnish a part of the duplicate bills, will not excuse the insured from using every means in his power to procure such as were obtainable, and his ability or otherwise is a question for the jury.

Mispelhorn vs. Farmers' F. Ins. Co., Md. C. A., 53 Md., 473; 9 Ins. Law Jour., 417.

60. Suit was brought on four policies by defendant on same property, insuring W. & M. & Co. as theirs, but the insured were described as "W. & M. & Co. as interest may appear;" the loss was payable to L. & D., the latter being plaintiff. The policies provided that if the interest of assured, whether as owner or mortgagee, be not truly stated they should be void; also that if the interest be other than the sole and unconditioned ownership, etc., it must be so represented, etc.; also that the proofs must give the written portion of all policies, and a duly verified builder's certificate of the value before the fire, and plans and specifications verified by the insured if required; and that all attempts at fraud, etc., should avoid it; also that in case of difference there should be an arbitration at the request of either party, and no action should be sustainable until an award had been made. Proofs and specifications were duly forwarded, but were signed by but one of the insured, and contained neither the builder's certificate nor the written portion of the other policies, though they were referred to. The company was requested to notify if they were deficient, and the defect would be remedied. Considerable correspondence took place concerning the insufficiency of the proofs, and the amount to be paid for the loss. *Held*, that the company might insist on the written portion of the other policies being inserted in the proofs, though they were all in the same company and identical, but a failure to insist on this was a waiver of the requirement. *Held*, that the phrase, "as interest may appear," indicated uncertainty as to the quality as well as extent of the interest, and leaves the whole question of the title of the insured open for explanation by evidence *aliunde* the contract, and this phrase sufficiently protected the interest of W. as mortgagee, though he was described as owner.

Pitney vs. Glens Falls Ins. Co., 65 N. Y., 6; Inhab. of Northampton vs. Smith, 11 Metc., 390; Rogers vs. Traders' Ins. Co., 6 Paige, 588; Steele vs. Ins. Co., 17 Penn. St., 290; Finney vs. Ins. Co., 8 Metc., 348; Watson vs. Swan, 11 C. B. (N. S.), 755.

Held, that instructions which in effect authorized the jury to find out from all the circumstances whether there had been a waiver of defective proofs, was not erroneous. A defect once pointed out need not be repeated; but when, in reply to more

specific information as to its nature, the reply is confined to the plans and specifications, the jury have a right to infer a waiver of defective proofs. *Held*, that if in the final correspondence between the parties which brought to a single point the difference in relation to an adjustment of the amount due, there was no objection to the failure of one of the insured to sign the affidavit, that failure was waived. *Held*, that where the plans and specifications were made by a builder selected by the adjuster, and there was evidence that they were placed by the company in the hands of a builder from whose report the company decided that a new replacement would cost less than the insurance, and there must be arbitration, and that finally the only difference between the parties was as to amount due, and the evidence as to their sufficiency was contradictory, the question of their sufficiency was for the jury. A question whether insured had furnished plans and specifications which would enable a fairly competent party to estimate the value of the buildings was not improper. A fraud which will avoid a policy, is a trick or artifice to induce another to fall into error to his harm. Where the magistrate personally filled in the certificate according to the formal requirements of the policy, and though he did not at the time make the required examination of the premises, he had a knowledge and recollection of them, and of the circumstances of the insured, and had before him the estimates of his neighbors in whom he had confidence, it was for the jury to say whether there was fraud in the preparation of the certificate, and whether it was a compliance with the policy requirement.

Maier vs. Ins. Co., 67 N. Y., 292.

Held, that the interest of L. in the policy having passed to D., the latter could recover for the whole amount, and that recovery would be a bar to further action. Where the company declined to specify the particulars in which the proofs were unsatisfactory, and in response to inquiries by insured, returned the same vague and unsatisfactory answer, the latter had a right to commence suit, taking the risk of satisfying the court as to their sufficiency, and a finding by the jury that certain objections were waived and others not read, is sufficient answer to the objection that the

proofs were not perfected, and therefore that the suit was premature.

Dakin vs. Liverpool, Lond. & Globe Ins. Co., N. Y. C. A., 77 N. Y., 600; 8 Ins. Law Jour., 577.

61. The insured having testified that he delivered to the adjusting agent of the company a paper containing a notice and estimate of his loss, and was told it was sufficient, and another witness having testified that the agent, upon being asked if any further notice or anything was required, answered there was not, it was *held* that a waiver of further preliminary proof might be inferred. The policy stipulating that the preliminary proof should be delivered at the office of the company, a delivery to any officer in charge of the office was sufficient, and such officer was authorized to waive any further proof than that submitted. The paper delivered to the agent as preliminary proof, was admissible only to establish the waiver, and not as evidence of the extent of plaintiff's damage. The submission to the jury of the question of waiver of preliminary proof was not erroneous, under an averment that the paper served was accepted as preliminary proof.

Edgerly vs. Farmers' Ins. Co., Iowa S. C., 48 Iowa, 644.

62. Where a building and its contents were destroyed by fire, and the officers of the insurance company wherein the same were insured, were at once informally notified of the loss, and thereupon summoned a meeting of the board of directors, who passed a formal resolution not to pay the amount of the loss; in an action subsequently brought by the insured against the company to recover the amount of said loss: *Held*, that the question was properly submitted to the jury, whether the company had not, by its action, waived a right to demand that formal proof of loss, which was, by its charter, made a condition precedent to any claim against it.

Lycoming Co. Mut. Ins. Co. vs. Schreffler, 8 Wr., 269.

Farmers' Mut. F. Ins. Co. vs. Moyer, Pa. S. C., 10 Ins. Law Jour., 514.

63. Conduct of the insurers calculated to induce a belief in the

mind of the insured that the presentation of preliminary proofs would not be required, or that those furnished are sufficient, is a waiver of objections to their sufficiency or non-production, and conflicting testimony regarding such waiver is for the jury. Proofs of loss are admissible as evidence of the compliance of insured with the terms of the policy, but not as evidence of the amount of loss. When such evidence is not objected to at the time, or a request made for instructions limiting its admissibility, the court is not bound to instruct the jury, and complaint cannot afterwards be made.

People vs. Collins, 48 Cal., 277; *People vs. Estrada*, 49 Cal., 171.

No such instruction was asked by defendant in the present case. Unless requested to do so, the court is not bound to give any instructions to the jury.

Carter vs. Bennett, 4 Fla., 283; *Averett vs. Brady*, 20 Ga., 523; *Wood vs. Figard*, 28 Penn. St., 403; *Ward vs. Howard*, 4 Jones, 23; *Jones vs. State*, 20 Ohio, '34; *Taft vs. Wildman*, 15 Ohio, 123.

Williams vs. Hartford F. Ins. Co., Cal. S. C., 54 Cal., 442; 9 *Ins. Law Jour.*, 447.

63. Evidence tending to excuse delay in furnishing proofs of loss, and to show waiver of the condition requiring the same to be furnished "as soon as possible" after a fire, is properly for the jury, and its weight is for them to settle.

Miller et al. vs. Germania Ins. Co., *Tioga Co. (Pa.) C. P.*, 6 *Ins. Law Jour.*, 873.

64. Our courts possess the power to instruct the jury to find, as in case of nonsuit, that plaintiff's evidence did not conduce to prove any cause of action, and they ought to find for defendant, etc., yet such power should not be exercised except in cases where there is no room for doubt. Such charges are like demurrers to evidence, and they should not be sustained if the evidence taken as wholly true, proves, or fairly tends to prove, the case by any or all of the conclusions properly and legally deducible therefrom. Where a loss occurs by fire, and the preliminary proof of loss is made by the agent of the insured, the insurance company cannot question his authority as such agent, if it be shown that the same person, in his capacity as such agent, had effected the insurance,

paid the premium, received the policy, and in every manner been recognized by the company as such agent, nor can the insurer object, for the first time, on the trial to any defect in the preliminary proof of loss. Such objections must be made within a reasonable time after reception of the proof, and an opportunity given the insured to amend. Where the policy of insurance contains a condition that in case of loss the "preliminary proof of loss shall be made within a reasonable time," the reasonableness of the time must depend upon the facts in each particular case. What is or is not a reasonable time is a mixed question of law and fact, to be submitted to the jury under proper instructions from the court.

Swan vs. L. L. & Globe Ins. Co., Miss. S. C., 52 Miss., 704.

65. Objections to preliminary proofs are waived, in an action on an insurance policy, by objections to the payment of the policy upon other grounds. An allegation of compliance with a condition is supported by proof that the underwriters waived the condition.

Atlantic Ins. Co. vs. Manning, Col. S. C., 3 Col. R., 224.

See Cross Index for other cases bearing on PROOFS OF LOSS.

REBUILDING.

See REPLACEMENT.

RECEIPT.

ABSTRACT OF THE LAW.

a. A receipt is only *prima facie* evidence of payment, and may be explained for the purpose of recovering the amount due, but not for the purpose of impeaching the validity of a policy which requires prepayment of premium in order to be operative. A receipt incorporated in such a policy, when de-

livered, is usually conclusive against the insurer where the validity of the contract itself is in question.

Consolidated F. Ins. Co. vs. Cashaw, 41 Md., 59; *Hemingway vs. Bradford*, 14 Mass., 121; *Provident Ins. Co. vs. Fernell*, 49 Ill., 180; *Basch vs. Ins. Co.*, 35 N. J., 429.

b. The delivery of the policy itself has generally been held a waiver of the required prepayment, but the authorities are not agreed. Where the delivery, however, is understood by the parties to be conditional that it is not to be binding, or merely for examination, prepayment is not waived.

Wood vs. Ins. Co., 32 N. Y., 619; *Boehen vs. Ins. Co.*, 33 N. Y., 181; *Troy F. Ins. Co. vs. Carpenter*, 4 Wis., 20; *Ins. Co. vs. Smith*, 3 Whart., 520.

See further on this subject under PAYMENT, PREMIUM, WAIVER.

DIGEST OF RECENT CASES.

1. Agent gave the insured a receipt acknowledging \$100 premium on their application for \$8,000 insurance, on 41 bales of cotton, from Macon to Alexandria by railroad, and by steamer from Alexandria to New York. No specified risk was mentioned in the receipt. It was customary for the agent to give such receipts as sufficiently binding, but afterward to give policies in exchange for them when desired. No policy in this case was asked for or given. The insurance was treated by the agent and company as a marine risk. *Held*, that the receipt cannot be regarded as a complete contract of insurance. It would be in excess of the agent's authority to bind the company by a contract in which the nature of the risk was not specified. Every policy must specify the peril insured against.

Baptist Church vs. Brooklyn Ins. Co., 28 N. Y., 153, 161, 164; *Tyler vs. New Amsterdam Ins. Co.*, 4 Robt., 151.

Held, that the receipt must be treated as a mere application and evidence of a title to insurance.

Ellis vs. Albany City Fire Ins. Co., 50 N. Y., 402.

The insured must be presumed to have known the character of the company's business, to have expected an appropriate policy, and to have expected insurance on the usual terms imposed by the company. The insurance must be governed by the conditions imposed by such a policy as the insured was entitled to upon his application.

De Grove vs. Metrop. Ins. Co., N. Y. C. A., 4 *Ins. Law Jour.*, 909.

See Cross Index for other cases bearing on RECEIPT.

RECEIVER.

ABSTRACT OF THE LAW.

a. The receiver, in so far as he acts in the interest of the company, is its representative, and may stand in the place of the directors, and his power to sue is limited to cases where the company might have sued, but, in so far as he acts for the creditors, he is their representative, and may institute suits against the stockholders as their interests require, and cannot favor stockholders, or policy holders to their disadvantage, though the directors might have done so.

Evans vs. Ins. Co., 9 Allen (Mass.), 329; *Osgood vs. Layton*, 3 Keyes, 521; *Thomas vs. Whallon*, 81 Barb. (N. Y.), 172; *Osgood vs. Ogden*, 4 Keyes, 70.

See further on this subject under INSOLVENCY.

DIGEST OF RECENT CASES.

1. That an insurance company has ceased to do business as such, that it has reinsured its risks, and that its officers are engaged merely in collecting its assets and paying its debts, are not sufficient reasons for appointing a receiver or issuing an injunction.

Street vs. Citizens' F. Ins. Co., N. Y. Chy. Ct., 8 Ins. Law Jour., 79.

See Cross Index for other cases bearing on RECEIVER.

REFORMATION OF CONTRACT.

ABSTRACT OF THE LAW.

a. Equity can be invoked to reform a written instrument only when the contract fails to express in material matters the real agreement between the parties; it cannot be invoked to make a new contract, or to amend, when any doubt exists. The variance must be shown by the clearest evidence.

Ins. Co. vs. Wilkinson, 18 Wall., 222; *N. Y. Ice Co. vs. Ins. Co.*, 31 Barb. (N. Y.), 73; *Meade vs. Westchester F. Ins. Co.*, 64 N. Y., 454; *Andrews vs. Essex F. and M. Ins. Co.*, 3 Mass., 6; *Equitable Ins. Co. vs. Hearne*, 20 Wall. (U. S.), 494.

b. Mistakes of law or fact will not authorize the reformation of a contract which embodies the real agreement of the parties as made.

Leavitt vs. Palmer, 3 N. H., 19; *N. Y. Ice Co. vs. Ins. Co.*, *supra*.

c. The mistake must be mutual.

Cooper vs. Farmers' Ins. Co., 50 Penn. St., 239; *Dodge vs. Essex Ins. Co.*, 12 Gray (Mass.), 65; *Goddard vs. Monitor Ins. Co.*, 108 Mass., 57.

d. The reformation must be sought with reasonable diligence upon the discovery of the mistake, but the fact that a loss has occurred, is not necessarily a bar.

Paddock vs. Com. Ins. Co., 104 Mass., 521; *Van Tuyle vs. Westchester F. Ins. Co.*, 55 N. Y., 657.

See further on this subject under **EQUITABLE RELIEF**.

DIGEST OF RECENT CASES.

REFORMATION OF CONTRACT—WHAT WILL JUSTIFY.

1. Application was made by letter for insurance "on the charter-party of the bark *Maria Henry*—voyage from Liverpool to Cuba, and to Europe via Falmouth, for orders where to discharge." After some correspondence regarding the rate, the company wrote, "We will write upon the charter of the bark *Maria Henry* as proposed by you, Europe to Cuba and back to Europe—at 3½ per cent, net; it is worth something, you know, to cover the risk at the port of loading in Cuba." Insurer replied, "I accept your proposition; please insure—at and from Liverpool to Cuba and to Europe via a market port for orders where to discharge." The policy was "on charter of bark *Maria Henry* at and from Liverpool to port of discharge in Cuba, and at and thence to port of advice and discharge in Europe." The vessel proceeded from Liverpool to a port of discharge, and thence to another port of loading in Cuba, and was lost on her return. *Held*, that the correspondence constituted a preliminary agreement. The policy was intended to put this agreement in a more full and formal shape. The assured must be presumed to have read the correspondence with care, and to have assumed that the policy conformed to the agreement therein. The principles upon which a court of equity will reform the contract are those stated in *Hearne vs. New England Mutual Marine Ins. Co.* (4 Ins. Law

Journal.) The correspondence implies that the port of loading might be one other than the port of discharge, and what is implied is as effectual as what is expressed.

Dickey vs. Balt. Ins. Co., 7 Cr., 327; *Bond vs. Nutt*, 2 Cowper, 601; *Tholuson vs. Ferguson*, 1 Doug., 360; *Cruikshank vs. Jansen*, 2 Taunt., 310.

The clear terms of the preliminary agreement warrant a court of equity in reforming the contract as expressed in the policy, to allow the use of two ports in Cuba.

Equitable Safety Ins. Co. vs. Hearne, U. S. S. C., 20 Wall., 494; 4 *Ins. Law Jour.*, 590.

2. It is not, strictly speaking, accurate to say that courts of law, where, as in Illinois, the distinction between jurisdiction in law and equity is rigidly adhered to, will correct mistakes in written instruments. They have no power to order changes made in the phraseology of written instruments offered in evidence; they simply adjudicate the rights of the parties upon the instruments as they are, but in construing them they seek for the intention of the parties, and if this can be discerned, from all the language employed, clearly and satisfactorily, effect will be given it; a court of law will not receive parol evidence to contradict or enlarge the terms of a written instrument. But in a court of equity, parol evidence is admissible of the real agreement between the parties in variation of the terms of the written agreement, and upon this, when sufficient, the mistake of the parties will be rectified, and the contract enforced as corrected.

The American Express Co. vs. Pinckney, 29 Ill., 292; *Burr vs. Broadway Ins. Co.*, 16 N. Y., 274; *Bernard et al. vs. Cushing et al.*, 4 Metcalf, 233.

It was alleged that the policy by mistake was made to run from the 22d of May, 1874, to the 2d of April, 1874, instead of the 2d of April, 1875, and on the policy was indorsed, "Expires 7th April, 1875." *Held*, that the indorsement was evidently but a memorandum, without any obvious authority to bind anybody, and confessedly inaccurate, and was inadmissible in law to explain the ambiguity. *Held*, that the face of the policy failing to show the intention, the mistake was peculiarly within the province of equity.

Savage et al. vs. Berry, 2 Scam., 565.

Held, that it was competent for the court in the same decree

to rectify the mistake, and give judgment for the amount due upon the policy as rectified.

Balance vs. Underhill, 3 Scam., 459; *Willis et al. vs. Henderson*, 4 Ind., 18; *Broadwell vs. Broadwell*, 1 Gilman, 605.

Mercantile Ins. Co. vs. Jaynes et al., Ill. S.C., 7 Ins. Law Jour., 754.

3. Plaintiff applied to the local agent, who filled up an application for insurance on plaintiff's three-story frame water power mill-building. The application was forwarded to the general agent, who remarked that the wrong blank had been used, filled out another designed for such property so far as the statements would allow, sending it to the local agent to be completed and signed by the applicant—sending also the policy for delivery. The filling up of the second application was completed by the local agent and signed by the applicant. The value of the building was entered in the second application by the general agent at \$4,000; this was corrected by local agent to \$2,000, and to the question "value of machinery," was added \$2,000. The general description in each application was simply that of "building." It appeared that the building alone was worth less than \$4,000. Both the local agent and insured testified that the intention was to cover building and machinery. In an action to reform the policy so as to include the machinery; *Held*, that the intention of the parties to cover the machinery was apparent from the second application, and from the amount insured. The term mill-building might properly be regarded as including the machinery.

Phoenix Fire Ins. Co. vs. Turner, 1 Paige, 278.

Held, that the act of the agent in filling up the application was that of the company, which was responsible for any misdescription.

Ins. Co. vs. Wilkinson, 13 Wall., 234.

Held, that the case is a proper one for equitable relief, and the policy should be reformed to include the machinery.

Hearne vs. Marine Ins. Co., 20 Wall., 490; *Gillespie vs. Moon*, 2 John. Ch., 597; *Lyman vs. United Ins. Co.*, id., 632.

Brugger vs. State Invest. and Ins. Co., U. S. C. C., 8 Ins. Law Jour., 293.

4. Where it appeared that through a mistake the street number of the insured premises was wrongly stated in the policy: *Held*, that the mistake may be rectified by a court of equity.

Mann, receiver, vs. Meyer, Ill. S. C., 8 Ins. Law Jour., 905.

5. The policy upon the stock of a German jobber and importer prohibited the keeping of certain hazardous articles without permission, among which were fire-crackers and fireworks. Permission was given for the former, but not the latter. In an action at law brought in the Baltimore Superior Court, and afterward removed to the U. S. Supreme Court, it was held that the keeping of fireworks was a violation of the policy which avoided it, and the plaintiff was not allowed to show that the keeping of such goods was in the line of his business. A similar suit on another policy had been decided differently by this court, and it was sought in this action to reform the policy on the ground that permission to keep fireworks had been omitted by mistake. *Held*, that the cause of action was the same as in the former suit, requiring the same evidence for its support, though the form was different; therefore, the plaintiff must abide by his election, and the judgment rendered in the action at law was a bar to this suit. The doctrine of *res adjudicata* applies.

Gregory vs. Burrall, 2 Ed. Ch., 417; Rice vs. King, 7 J. R., 20; Johnson vs. Smith, 8 ib., 383; Morgan vs. Plumb, 9 Wend., 237; Washburn vs. Great Western Ins. Co., 114 Mass., 175.

Steinbach vs. Relief F. Ins. Co., N. Y. C. A., 77 N. Y., 498; 8 Ins. Law Jour., 621.

6. K. applied to an agent of defendant for insurance on cotton in behalf of a firm of which he was a member. The policy was made in the name of K., and made payable to the firm. K. was informed by the agent that it was not necessary for the policy to be in the name of the firm; that their interest would be fully protected. *Held*, that there was a mutual mistake in framing the contract, which it was the province of equity to correct. *Held*, that as the policy remained in the hands of the agent until after the loss, when K. first discovered the error and brought suit, there was no laches which would bar relief. *Held*, that a court of equity may grant relief from a mistake of law as well as fact.

Held, that the plaintiffs were entitled to have the policy reformed to cover the interest of the firm.

Simpson vs. Vaughan, 2 Atk., case 21, p. 33; *Henkle vs. Royal Exchange*, 1 Ves., Sr., case 156, p. 318; *Gillespie vs. Moon*, 2 Johns. Ch., 593; *Graves vs. Boston Mar. Ins. Co.*, 2 Cr., 443; *Insurance Co. vs. Wilkinson*, 13 Wal., 231; *Bradford vs. Union Bank*, 13 How., 65; *Hearne vs. Mar. Ins. Co.*, 20 Wall., 490, 496; *Hunt vs. Rousmanier*, 1 Pet., 15; *Wheeler vs. Smith*, 9 How., 82.

Snell, Taylor & Co. vs. Atlantic F. & M. Ins. Co., U. S. S. C., 8 *Ins. Law Jour.*, 17.

7. Where the application was filled by the agent and contained false answers on the strength of which the policy was issued; *Held*, that when there is a mutual mistake between the contracting parties to an insurance policy, parol evidence is admissible to reform the policy.

Cases distinguished of *Susquehanna Ins. Co. vs. Perrine*, 7 W. & S., 348; *Smith vs. Ins. Co.*, 12 Harris, 320; *State Mutual Fire Ins. Co. vs. Author*, 6 Casey, 315, and *Cooper vs. Farmers' Mutual Fire Ins. Co.*, 14 Wright, 299.

Ellenberger vs. Prot. Mut. F. Ins. Co., Pa. S. C., 89 *Pa.*, 464; 8 *Ins. Law Jour.*, 822.

8. In an action for a loss upon an insurance policy, an averment in the complaint of a mistake in the policy, and a prayer for its reformation, give jurisdiction in equity. If the policy should be reformed, the court will retain jurisdiction for the determination of all issues which may be made upon it; and all issues of fact will, if required, be tried by a jury.

Story's Eq., § 154-157; *Follett vs. Heath*, 15 Wis., 601; *Harrison vs. Bank*, 17 Wis., 340; *Parker vs. Ins. Co.*, 34 Wis., 363; *Roberts vs. Ins. Co.*, 41 Wis., 327; *Prescott vs. Evarts*, 4 Wis., 314; *Akerly vs. Vilas*, 15 Wis., 401; *Hamilton vs. Fond du Lac*, 25 Wis.

Hammel vs. Queen Ins. Co., Wis. S. C., 9 *Ins. Law Jour.*, 905.

9. A policy expiring on the 23d, was renewed for a month on the 26th, and the loss occurred on the 24th of the following month. The renewal was dated the 23d. *Held*, that the company having accepted the premium for a month, was bound to give all the insurance paid for, and insured was entitled to a reformation of the contract to date, from the 26th, and to recover.

Hey vs. Farmers and Mechanics' Fire Ins. Co., Cinn. (Ohio) Superior Court.

WHAT WILL NOT JUSTIFY.

10. Plaintiff brought a bill in equity to reform a contract of marine insurance by striking out certain articles alleged to have been left standing against the express agreement of the parties, and without his knowledge or that of his agent. *Held*, that the plaintiff, having brought an action in the court of law upon the policy in its original form to recover the amount of insurance named therein, had conclusively elected to consider it as expressing the true contract between himself and the company, and to abandon any attempt to have it reformed in equity.

Sanger vs. Wood, 3 John., Ch., 46.

Washburn vs. Great Western Ins. Co, Mass. S. J. C., 114 Mass., 75; 4 Ins. Law Jour., 112.

11. Equity will reform a written contract where the terms are contrary to the common intention of the parties, and the parties will be placed as they would have stood if the mistake had not occurred. The party alleging mistake must show exactly what it is and what the correction must be.

Beaumont vs. Bramley, 1 T. & R., 41-50; *Marquis of Breadalbane vs. Marquis of Chandos*, 3 M. & C., 711; *Fowler vs. Fowler*, 4 D. G. & Jones, 265; *Sells vs. Sells*, 1 Dr. & S., 42; *Lloyd vs. Crocker*, 19 Beav., 144.

The mistake must be mutual, not on one side.

Rook vs. Lord Kensington, 2 K. & J., 753; *Eaton vs. Bennet*, 34 Beavan, 196; *Mortimer vs. Shortall*, 2 Dr. & War., 372; *Sells vs. Sells*, *supra*.

Where the minds of the parties have not met, there is no contract, and hence none to be reformed.

Bently vs. McKay, 31 L. J., Chy., 709; *Baldwin et al. vs. Midleburger*, 2 Hall, 176; *Coles vs. Bowen*, 10 Paige, 534; *Caverley vs. Williams*, 1 Vesey, jr., 211.

This jurisdiction is applied, when necessary and proper, to the reformation of insurance contracts.

Harris vs. Col. Co. Ins. Co., 18 Ohio R., 116; *Firemen's Ins. Co. vs. Powell*, 13 B. Monroe, 311; *Nat. Fire Ins. Co. vs. Crane*, 16 Md., 260

Hearne vs. N. E. Mut. Mar. Ins. Co., U. S. S. C., 20 Wall., 489; 4 Ins. Law Jour., 582.

12. The applicant wrote to the agent for "insurance on my house, payable," etc. The agent supposing him to refer to the house in which he was living, issued a policy thereon, whereas the applicant

did not own that house but referred to the adjoining building, which was already insured in the company. The rate charged was lower than that of the building intended, which also contained a paint shop. *Held*, that a court of equity will only reform a contract, in the absence of fraud, when it is perfectly clear that both parties agreed to something different from what is expressed in the writing. *Held*, that as the defendant did not intend to insure the property which the plaintiff desired, equity cannot reform the contract to cover that property, although the failure resulted from a misapprehension of the defendant.

Mead vs. Westchester Fire Ins. Co., N. Y. C. A., 64 N. Y., 453 ; 5 Ins. Law Jour., 907.

13. Application was made for insurance on a charter "from Liverpool to Cuba, and load for Europe via Falmouth," etc. The company replied, "as requested we have entered \$5,000 on charter to port in Cuba, and thence to port of advice and discharge in Europe." The vessel proceeded to a port of discharge in Cuba, and thence to another port in Cuba, where she loaded and was lost on her return voyage. *Held*, that the correspondence constituted a preliminary agreement. The company's answer was plain, and admitted of but one construction. It must be presumed that the insured read and understood it. Therefore equity cannot reform the contract to allow the use of two ports instead of one, on the ground of ambiguity. It was claimed that the use of two ports was justified by an established usage. *Held*, that it was not necessary that the usage should be communicated to the insurers ; they are presumed to know it.

Noble vs. Kennedy, 2 Doug., 492.

Usage is admissible to explain an ambiguity but never to contradict a plainly written contract.

Bracket vs. Roy. Ass. Co., 2 Cr. & J., 250 ; Crofts vs. Marshall, 7 C. & P., 607 ; Philips vs. Briard, 1 H. & N., 21.

Parol evidence is inadmissible to vary the established legal meaning of the written words, unless such meaning is inconsistent with the general terms of the contract or the extrinsic facts.

Yates vs. Pym, 5 Taunt., 446 ; Bracket vs Roy. Ass. Co., supra.

Parol evidence can never be received where inconsistent with the contract.

Holding vs. Pigot, 7 Bingham, 465; Clark vs. Roystone, 13 M. & W., 752; Freeman vs. Loder, 11 A. & E., 589; Quincy vs. Dennis, 1 H. & N., 216.

The apparent intention of the parties to be governed by what is written, is sufficient to establish this inconsistency.

Hutton vs. Warren, 1 M. & W., 447; Clark vs. Roystone, *supra*.

The principle of the admissibility of such testimony, is the judgment of the court as to the meaning of the parties, implied and expressed by the language they employed.

U. S. vs. Babbit, 1 Black., 61.

Held, that the implied and expressed meaning in this case is that but one port should be visited, and proof of usage is inadmissible. The case is one of deviation.

Hearne vs. N. E. Mut. Mar. Ins. Co., U. S. S. C., 20 Wall., 489; 4 Ins. Law Jour., 582.

See Cross Index for other cases bearing on REFORMATION OF CONTRACT.

REINSURANCE.

ABSTRACT OF THE LAW.

a. Reinsurance may be applied, either to the whole, or a part of the original risk.

Philadelphia Ins. Co. vs. Wash. Ins. Co., 23 Penn. St., 250.

b. There is no privity between the original insured and the reinsurer, the latter is liable solely to the reinsured.

Herckenrath vs. American Mutual Ins. Co., 3 Barb. Ch., 63.

c. But the reinsurer may make the same defense as the reinsured, and his liability depends upon that of the latter.

Delaware Ins. Co. vs. Quaker City Ins. Co., 3 Grant's Cas., 71; Eagle Ins. Co. vs. Lafayette Ins. Co., 9 Ind., 443; Carpenter vs. Providence Ins. Co., 16 Pet., 495.

d. The reinsured may recover to the extent of the liability of the reinsurer regardless of the amount of his own payment, or whether payment has been made at all, but must prove against the reinsurer in the same manner as is required of the original insured, and can recover only to the extent of his own liability to pay.

Hone vs. Mutual Safety Ins. Co., 1 Sandf., 137; Yonkers and New York Ins. Co. vs. Hoffman Ins. Co., 6 Robt. (N. Y.), 316; N. Y. State Marine Ins. Co. vs. Protection Ins. Co., 1 Story, 458.

e. Failure on the part of the reinsured to disclose facts material to the risk, when within his knowledge, will forfeit the reinsurance.

New York Bowery F. Ins. Co. vs. Ins. Co., 17 Wend., 359.

f. The liability of the reinsurer is not affected by the insolvency of the original insurer.

Herckenrath vs. American Mutual Ins. Co., 3 Barb. Ch., 63; Carrington vs. Com. F. & M. Ins. Co., 1 Bos., 152.

g. Contribution in case of "other insurance," in a reinsurance contract, means other reinsurance.

Mutual Safety Ins. Co. vs. Hone, 2 Comst., 235.

h. The reinsurer is liable for costs of a justifiable defense by reinsured, when notified and it does not object, but not when the defense is not justified, unless it consents.

N. Y. State Mar. Ins. Co. vs. Ins. Co., 1 Story C. C. R., 458; Hastie vs. De Peyster, 3 Calnes (N. Y.), 190.

DIGEST OF RECENT CASES.

REINSURANCE—WHEN IT NEED NOT BE DISCLOSED.

1. In England, in effecting a marine reinsurance "on goods," it is not necessary to disclose the fact that it is a reinsurance, and recovery may be had on a policy in which the interest is not so stated.

Crowley vs. Cohen, B. & Ad., 478; Cases of McSwiney vs. Royal Exc., 15 Q. B., 634; Glover vs. Black, 3 Burr., 1394; Lucena vs. Craufurd, 2 Bos. & P., N. R., 269; Routh vs. Thompson, 11 East., 428, distinguished.

McKenzie vs. Whitworth, Eng. C. A., 5 Ins. Law Jour., 473.

RELATIONS BETWEEN REINSURER AND REINSURED.

2. The original insurance was for \$600. A policy of reinsurance for \$2,000 of the amount was payable *pro rata*, and at the same time with the reinsured. The loss was settled for \$600. *Held*, that the case was different from that of an insolvent company still liable but unable to pay. The reinsurer was liable only for a *pro rata* of the sum paid, or \$200.

Andes Ins. Co. vs. Ill. Mut. Ins. Co., Ill. S. C., 2 Ins. Law Jour., 899.

3. In the case of an ordinary policy of insurance, and a loss, the sum insured is the extent of the insurer's liability, but not the

measure of the claim of the assured. The contract being one of indemnity, he is entitled only to that, and the actual loss sustained by the assured is the measure of indemnity to which he is entitled when it is less than the sum insured.

Bainbridge vs. Nelson, 10 East., 346; Hamilton vs. Mendes, 2 Burr., 1210.

Where an insurance company, after having taken a risk and reinsured in another company to indemnify itself against loss on its policy, discharges its liability by the payment of a less sum than that reinsured, the sum so paid by it will be taken as the amount of damage sustained, and the measure of indemnity to be recovered of the second company.

Howe vs. Mut. Safety Ins. Co., 1 Sandf. R., 137; Eagle Ins. Co. vs. Lafayette Ins. Co., 9 Ind., 443, excepted to.

And where the policy of reinsurance contained this clause: "Loss, if any, payable *pro rata*, at the same time and in the same manner as the reinsured company," in case of a loss the reinsurer will only be bound to pay at the same rate the reinsured shall pay; so that, if the reinsured pays only ten cents on the dollar of its insurance, the reinsurer will pay at the same rate on the amount of its policy.

Ill. Mut. Fire Ins. Co. vs. Andes Ins. Co., Ill. C. A., 4 Ins. Law Jour., 820.

4. The Enterprise Insurance Company and the Fame Insurance Company entered into a contract by which the latter company agreed to reinsure the former on all its term risks in Ohio, Indiana, Illinois, Missouri, Kentucky and Pennsylvania, except Philadelphia, and exonerate it from all losses in one class of cases, exceeding \$5,000, and in others denominated "extra hazardous" exceeding \$2,500, and in the cases of dwelling-houses or their contents, to contribute for the payment of losses, if any, in various proportions and amounts. The losses, if any, were to be payable *pro rata* at such times and in such manner as the former company may pay. Losses covered by this agreement occurred by the fire in Chicago on October 8th and 9th, 1871. *Held*, that a court of equity would take jurisdiction of a bill by the assignee of the Enterprise Insurance Company against the Fame Insurance Company to enforce this contract. *Held*, that the reinsured can resort to equity as soon as the claim arises without waiting to pay the

original insured, and the words "may pay," held to be "liable to pay." *Held*, that as the act incorporating the Fame Insurance Company made it subject to the General Insurance Act of April 2d, 1856, authorizing companies to "reinsure themselves," the contract was not ultra vires. The sending to the Fame Insurance Company of insurances which they ought not to have had, and the withholding others which they should have had under the contract, did not work a forfeiture.

Fame Ins. Co's Appeal, Pa. S. C., 83 Penn., 396.

5. Where one is bound to protect another from a liability, he is bound by the result of a litigation, in good faith, to which such other is a party, provided he had notice of the litigation and opportunity to control and manage it.

State vs. Coste, 36 Mo., 432; Mors-le-Blanch vs. Wilson, L. R., 8 Com. Pl., 227; Robbins vs. City of Chicago, 4 Wall., 657; S. C., 2 Black., 418.

The rule is applicable to the case of a reinsurer. The reinsured stands to his reinsurers in the same relation in which the original insured stands to him. The reinsurers may make the same defenses against him which he could make against the original insured. If a *bona fide* judgment is rendered against the original insurer and he has contested the matter in good faith for the protection of the reinsurer, with his acquiescence, the latter is bound to pay the costs and expenses incurred for his benefit, and is equally bound by the judgment.

N. Y. St. Mar. Ins. Co., vs. Protection Ins. Co.; Hastie vs. De Peyster, 3 Caines, 190.

The U. S. Ins. Co. had issued an inland policy on cotton on the Mississippi, which was destroyed by fire. The Phoenix Ins. Co. had issued a policy reinsuring the U. S. on all such risks taken on the Mississippi. In an action brought by the assignees of the U. S. against the Phoenix; *Held*, that allegations in the petition setting forth that the claim on the cotton had been unsuccessfully resisted by the U. S. Co., and that judgment had been obtained against the company, and that the Phoenix was privy to the suit, were proper in the pleadings, and the record of the suit and judgment was admissible on the trial.

Strong & Gantt vs. Phoenix Ins. Co., Mo. S. C., 62 Mo., 289; 5 Ins. Law Jour., 620.

6. An insurer whose risk is reinsured, is not obliged, in order to maintain his action against his reinsurer, to show that he has paid the loss. He may at once resort to his action against the reinsurer, and to such action the reinsurer may make the same defense that the reassured could make against the original assured, or the reassured may await a suit by the first assured, and when it is brought, give notice of it to his reinsurer. If the reassurer desires the claim contested, he may take part in the defense. If he neither participates in the defense, nor gives notice that he does not object to the claim, he will be taken to have required the reassured to defend for him, and the latter becomes, by operation of law, *sub modo*, his agent for that purpose. If the reassured then defends in good faith, the judgment will be binding upon the reinsurer as to all matters which could have been litigated therein, and will make him liable for the costs and expenses of the litigation; but no judgment collusively obtained will support a recovery against the reinsurer. An insurance company having reinsured in other companies part of a risk on a boat load of cotton, and being about to be sued by the insured for a loss, entered into an arrangement with the reinsuring companies, by which it was agreed that the first insurer should employ such counsel as it saw proper to defend the suit, and in the event the defense should be successful the reinsurers should pay their *pro rata* proportion of the attorney's fees and costs, and in the event it should fail, they should pay their *pro rata* proportion of the judgment, attorneys' fees, and costs. *Held*, that this agreement did not alter the relations of the parties to the contracts of reinsurance; that the reassured undertook no new duty, and the reinsurers incurred no new obligation except the liability to pay a share of the expenses in the event of a successful defense; and this was merely supplemental in its nature, and did not affect the policies; that the agreement, at most, made the reassured the agent of the reinsurers for the purpose of making the defense, and not a trustee for them; that it did not irrevocably commit the defense to the reassured, but the reinsurers had the right at any time to come in and defend on their own behalf; that the attorneys employed by the reassured represented the reinsurers in the conduct of the suit; and that there

was nothing in the agreement which required the reassured company to retain a pecuniary interest in the litigation, or forbade it from making a compromise of its liability. An insurance company having entered into an agreement such as the foregoing with several reinsuring companies, afterward, pending the litigation, without their consent, compromised with the assured by paying a certain sum in cash, and agreeing in the event a judgment should be rendered in favor of the assured in the pending suit, to assign the policies of reinsurance to them. The assured, on their part, agreed to enter satisfaction of any such judgment on receiving such assignments. The contract further reserved to the reassured company the right to continue the defense of the suit, and provided that the assured should retain the money paid, even though they failed in their suit. The assured subsequently recovered judgment, and the policies of reinsurance were then assigned to them, as had been agreed, and the judgment was entered satisfied. The reinsuring companies had knowledge of this contract for about a month before the trial took place, but took no step to interpose any defense for themselves, or to prevent the reassured company from making the defense. In a suit upon one of the assigned policies brought by the trustees of the original assured: *Held*, that this contract created no conflict between the duty and interest of the reassured company; that all the reinsuring companies could demand was an honest defense of the suit, and the contract did not disable the reassured from making this; that the fact that it no longer had any substantial interest in the controversy did not disqualify it from continuing the defense; that the reinsuring companies having failed to interpose, must be considered as having acquiesced in its right to do so, and in the absence of evidence of want of good faith on the part of the reassured company in making the defense, the reinsurers must be bound by the judgment. In an action on a policy of reinsurance the true measure of damages is not what the reassured has paid the original assured, but what he is bound, under his policy, to pay by reason of the loss.

Strong vs. Phoenix Ins. Co., 62 Mo., 298; Hone vs. Mutual Safety Ins. Co., 1 Sandf., 137; New York State Marine Ins. Co. vs. Protection Ins. Co., 1 Story.

C. C., 458; *Eagle Ins. Co. vs. Lafayette Ins. Co.*, 9 Ind., 433; *Blackstone vs. Allemania Fire Ins. Co.*, 56 N. Y., 104; *Herckenrath vs. American Mut. Ins. Co.*, 3 Barb. Ch., 63; *Carrington vs. Commercial Fire & Marine Ins. Co.*, 1 Bosw., 152.

Gantt vs. Am. Cent. Ins. Co., Mo. S. C., 68 Mo., 503; 8 *Ins. Law Jour.*, 664.

7. This was merely a case of ordinary reinsurance, no policy being issued, no written agreement being entered into, but the application for reinsurance by the Fireman's Ins. Co. being entered in the books of the Pelican Ins. Co., as it is inferred to be the custom among insurance companies in cases of this kind. If there was a stipulation *pour autrin*, or a contract whereby the Pelican Ins. Co. assumed the obligation of the Fireman's Ins. Co., the plaintiff cannot enforce it, because said agreement was not in writing, and the law is that the promise to pay the debt of another cannot be proved by parol evidence.

Egan vs. Fireman's Ins. Co., La. S. C., 27 La., 368.

8. A policy was issued upon a barge used as a freight boat, and upon its expiration a new policy was issued upon the same terms as the first. Shortly before the expiration of the first policy, a reinsurance of a portion was effected, loss, if any, payable *pro rata* with the reinsured. Afterwards privilege to carry baled hay, burn kerosene, etc., was granted by the original insurer for an additional premium. This fact was unknown to the reinsurer, and no portion of the extra premium was paid to it. There was an arrangement between the companies that the reinsurer should receive the same rate of premium as the reinsured, and such was the custom between companies at the time. *Held*, that a greater risk than that originally contemplated having been assumed by the original insured, and the reinsurer having received no consideration for the change, as required by the agreement, the latter was not liable.

St. Nicholas Ins. Co. vs. Merchants' Mut. F. & M. Ins. Co., N. Y. C. A., 10 *Ins. Law Jour.*, 137.

9. The plaintiffs, a marine insurance company, entered into an agreement with the defendants, a fire insurance company, that the defendants should, upon certain agreed terms, reinsure the

plaintiffs against loss by fire only on all coal-laden ships which should be insured by the plaintiffs, under their policies between certain ports, so long as the agreement remained in force; and successive policies to cover the risks insured on such ships as might be declared, were accordingly subscribed and issued by the defendants to the plaintiffs. It was admitted that, in the case of open policies on ships to be declared, there was a usage of merchants and underwriters that such policy attached to the goods as soon as, and in the order in which, they were shipped, in which order the assured was bound to declare them; and, in case of mistake, that the assured should be bound to rectify the declaration, which was sometimes done after loss. *Held*, that the admitted usage with regard to marine insurances applied, although the reinsurance with the defendants was a reinsurance against fire only; it being a contract of fire insurance in respect of a marine risk.

Maritime Mar. Ins. Co. vs. Fire Re-Ins. Corp., Eng. C. P., 9 Ins. Law Jour., 400.

10. A reinsurance may be effected at a value different from that of the original insurance so long as no misrepresentation is shown in effecting it.

Canada F. & M. Ins. Co. vs. Northern Ass. Co., Ontario C. A.

GENERALLY.

11. The directors of an insolvent company have no right, under the New York law regarding reinsurance, to reinsure the risks of unburned policy holders simply, and use funds for the purpose belonging to general creditors.

Casserly, receiver, vs. Mariners et al., N. Y. S. C.

12. The N. and S. company were consolidated. At the time of the merger there were judgments or pending suits for losses against both companies, and it was agreed that three stockholders of each should give their individual guaranty to the other company. Thereupon agreements were executed as follows: "We the undersigned agree to, and do guarantee and assume to pay, and

will pay all the debts and liabilities now outstanding against the —Company.” The two papers were deposited with the secretary of the consolidated company, which subsequently reinsured, and the reinsuring company failed. *Held*, in an action by an original policy holder of one of the guaranteed companies against the personal guarantors, that the papers were executed as an indemnity to the companies and were not guaranties to the individual creditors.

Hedges vs. Bowen, Ill. S. C., 7 Ins. Law Jour., 200.

See Cross Index for other cases bearing on REINSURANCE.

REMOVAL OF GOODS.

See POLICY.

See Cross Index for cases bearing on REMOVAL OF GOODS.

REMOVAL OF SUIT.

DIGEST OF RECENT CASES.

REMOVAL OF SUIT—WHEN APPLICATION FOR WILL BE SUSTAINED.

1. Upon filing petition and bond, within time, under act of Congress, for the removal of a suit from a State to the United States Circuit Court, the State court and State judges have no discretion but to order the removal, and direct that no further proceedings be had in said suit in the State court.

O'Malia vs. Home Ins. Co. of Columbus, C. P. Luzerne Co., Pa., 4 Ins. Law Jour., 719.

2. Petition was filed in the Superior Court of Cincinnati to recover for a loss under a fire policy. The company's answer set up the condition in the policy requiring suit to be brought within one year from the date of loss, and averred that more than a year had elapsed. No reply was filed to this answer, and the case was

pending in this condition at the time of the passage of the act of Congress of March 3d, 1875, relating to the removal of cases to the Federal courts; and thereafter, when more than a year after the passage of the act, in March, 1876, the defendant applied to remove the case into the U. S. Circuit Court, where the transcript was duly filed. The plaintiff thereupon moved to remove the case back to the State court, on the ground that the removal was made too late. *Held*, that no reply having been filed in the State court, the case was not at issue there, and therefore could not have been tried there at any time after the passage of the act and before the application for removal, therefore the application was not too late.

Michigan Central R. R. Co. vs. Andes Ins. Co., U. S. C. C., S. D. of Ohio, 6 Ins. Law Jour., 246.

3. A corporation may, through its authorized agent, make the affidavit required by act of Congress of 1867, regarding removal of causes to a Federal court, and thus avail itself of the benefit of that act.

Ins. Co. vs. Dunn, 17 Wall., 244; Farmers' Loan, etc., Co. vs. McQuillan, 3 Dillon, 379; Morrell vs. Milwaukee and St. Paul Railway Co., 3 Dillon, 460; Shaft vs. Phoenix Ins. Co., 67 N. Y., 544. The case of Cook vs. State National Bank, 52 N. Y., 96, excepted to.

The court must determine the sufficiency of the bond and the surety required by that act, but it may not arbitrarily reject the bond tendered, without specifying any cause.

Taylor vs. Shen, 54 N. Y., 75; Fisk vs. Union Pacific R. R. Co. 6 Blatchford, 362, 380; Bowen vs. Chase, 7 Blatchford, 255.

Mix vs. Andes Ins. Co., N. Y. C. A., 7 Ins. Law Jour., 624.

4. The act of 1875 requires a petition for removal to the U. S. Court to be filed before or at the term at which the cause could first be tried. A rule of the State court provides that a continuance may be granted upon a satisfactory showing that there is probable ground of defense unless notice of trial is given thirty days before the beginning of the term, etc. *Held*, that where neither party had given notice of trial and the cause, according to the usual custom, was silently continued and was not triable at the first term without the consent of the parties, the second and not

the first term was the trial term, and a notice of removal given at such term was not too late.

Palmer vs. Hall, 4 Dillon, 566, 569; *Preston vs. Travelers' Ins. Co.*, 58, N. H., 76.

Wheeler vs. L. & L. & G. Ins. Co., *U. S. C. C. N. H.*, 10 *Ins. Law Jour.*, 684.

5. An application for removal from a State to a Federal Court is in time, if it be made before the pleadings are completed, or the next term following their completion. There has been no express repeal of the statute of 1867, and there does not appear to be any by implication.

Scott et al., Trustees, vs. Clinton and Springfield R. R. Co., 6 Bissell, 529; *Michigan R. R. Co. vs. Andes Ins. Co.*, 9 Chicago Legal News, 34; *Taylor vs. Rochefellow*, *Am. Law Reg. (N. S.)*, vol. 18, No. 5, p. 313; *Insurance Co. vs. Dunn*, 19 Wall., 214; *Vannever vs. Bryant*, 21 Wall., 41; *Cork vs. Ford et al.*, 16 *Am. Law Reg. (N. S.)* 376.

Whitehouse vs. Ins. Co., *U. S. C. C. Pa.*, 9 *Ins. Law Jour.*, 789.

6. Under the act of 1875, a case is removed from the State to the United States Circuit Court by filing in the prothonotary's office the petition, bond and præcipe, directing the case to be certified to the Circuit Court, under the act of 1875, for trial. All further proceedings in the State court are *coram non judice*. The application and removal is a matter of right, and must be so regarded and treated by the State courts. If it can be established that the case is not properly removed, and does not fall within the act, the Circuit Court will, on motion, remand the case for trial to the court whence it was removed. The acts of 1789, 1866 and 1867 are repealed by the enactment of the revised statutes of 1874.

Osgood vs. C., D. & V. R. R. Co., 2 Cent. L. J., 275; *Dunham vs. Baird et al.*, 2 Weekly Notes, 52; *Insurance Co. vs. Dunn*, 19 Wallace, 214; *Insurance Co., vs. Morse*, 20 Wallace, 255; *Herrford vs. Aetna Insurance Co.*, 42 Mo., 151-3; *Warren vs. Wisconsin V. R. R. Co.*, 7 Chicago Legal News, 403.

It was held in the following cases that the State court must, before the case is removed, approve the bond and direct an order for removal.

First Nat. Bank vs. Iron Bridge Co., 2 Central L. J., 505; 7 Ph. Leg. Gaz., 262; *Mays vs. Taylor et al.*, 8 Chicago Legal News, 10; 7 Ph. Leg. Gaz., 326; *City of Chicago vs. Gage et al.*, 8 Ch. Leg. News, 49.

Jones vs. Amazon Ins. Co., *Luzerne (Pa.) C. P.*, 5 *Ins. Law Jour.*, 878.

WHEN APPLICATION FOR WILL NOT BE SUSTAINED.

7. A petition for removal to the United States court, simply alleging that the defendant is a citizen of Connecticut, and the plaintiff a citizen of New York, is fatally defective. There must be an allegation of citizenship at the time of commencing the action.

Holden vs. Putnam Fire Ins. Co., 46 N. Y., 1; *Clark vs. Matthewson*, 12 Peters, 164; *Mollan vs. Torrance*, 9 Wheat., 537; *People vs. Chicago*, 34 Ill., 356; *Savings Bank vs. Burton*, 2 Metc., (Ky.), 242; *Parker vs. Overman*, 18 How., U. S., 137.

The verification of the original complaint contained the caption "Chemung County, ss., Isidor Pechner of said county." *Held*, that this was not a sufficient allegation of citizenship to oust the jurisdiction of the State court.

Pechner vs. Phœnix Ins. Co., N. Y. C. A., 65 N. Y., 195; 4 *Ins. Law Jour.*, 782.

8. A verdict having been rendered against a corporation of another State, in the New Hampshire Supreme Court, a writ of review was sued out and a petition filed for removal of the action to the U. S. Circuit Court. *Held*, that under the 3d clause of sec. 639 of the Revised Statutes of the United States, such a petition cannot be filed after one trial has been had, although the action is one where review will lie.

Akerly vs. Vilas, 1 Abb. (U. S.), 284, and 24 Wis., 165; *Johnson vs. Monel*, Woolworth, 390; *Ins. Co. vs. Dunn*, 19 Wall., 214, and in Ohio S. C.; *Bryant vs. Rich*, 103 Mass., 192; *Badger vs. Gilmore*, 37 N. H., 459; *Andrews vs. Foster*, 42 N. H., 379; *Pike vs. Pike*, 24 N. H., 397; *Wetherbee vs. Johnson*, 14 Mass., 412; *Galpin vs. Critchlow*, Am. Law Register, March, 1874.

Whittier vs. The Hartford Fire Ins. Co., N. H. S. C., 4 *Ins. Law Jour.*, 622.

9. A petition for removal to a Federal court, which did not show that either party was a citizen of Mississippi, was properly refused.

Ins. Co. vs. Francis, 11 Wall., 20.

Liverpool, London, and Globe Ins. Co. vs. McGuire, Miss. S. C., 52 Miss., 227; 5 *Ins. Law Jour.*, 851.

10. Insured property was destroyed by fire alleged to have

been occasioned by the negligence of the defendant. The insurance covered only part of the value of the property and was paid by the insurer to the owner. The owner of the property, who was a citizen of Wisconsin, and the insurance company, which was a citizen of New York, joined in an action begun in the State court, to recover the total loss. The defendant was a citizen of Wisconsin, and attempted to remove the cause to the Federal Court. *Held*, that the case did not involve a controversy which, within the meaning of the second clause of section two of the removal act of 1875, was wholly between citizens of different States, and which could be fully determined as between them without the presence of the plaintiff who was a citizen of the same State with the defendant, and therefore that the case was not removable under that act.

Citing and discussing *London Assurance Company vs. Sainsbury*, 3 Doug., 245; *Mason vs. Sainsbury*, 3 Doug., 60; *Yates vs. Whythe*, 4 Bing. (N. C.), 272; *Hart et al. vs. Western R. R. Corporation*, 13 Metc., 105; *Rockingham Mut. Fire Ins. Co. vs. Boshier*, 39 Me., 254; *Conn. Mut. Life Ins. Co. vs. N. Y. & N. H. R. R. Co.*, 25 Conn., 270; *Peoria Ins. Co. vs. Frost et al.*, 37 Ill., 333; *Hall & Long vs. R. R. Co's*, 13 Wall., 370; *Ins. Co. vs. Erie R. R. Co.*, 73 N. Y., 999; *Swarthout et al. vs. R. R. Co.*, 43 Wis., 628; *Ætna Ins. Co. vs. R. R. Co.*, 3 Dill., 1; *Carragher vs. Brennan*, 7 Biss., 497; *City of Chicago vs. Gage*, 6 Biss., 467; *Merchants' Nat. Bank vs. Thompson*, 4 Fed. Rep., 876; *Bailey vs. New York Savings Bank et al.*, 2 Fed. Rep., 14; *Pratt vs. Radford et al.*, Wis. S. C., Wis. Legal News, May 5, 1881; *Barney vs. Latham*, Chicago Legal News, May 21, 1881.

First Presby. Soc., etc. vs. Goodrich Trans. Co., U. S. C. C. Wis., 10 Ins. Law Jour., 452.

11. An application for removal from a Mississippi court to the U. S. court, which failed to show that the plaintiffs were citizens of Mississippi, was fatally defective. Three replications were filed to a plea without an affidavit as required. *Held*, that the refusal of a motion to strike out two of them, was error calling for a reversal of judgment.

Hunter vs. Wilkinson, 44 Miss., 721.

All evidence and proceedings based on the allowance of such replications possessed their infirmity. Depositions that were inadmissible under the Miss. Code of 1851, but admissible under that of 1871, were taken between the two dates, and were read

at a trial subsequent to 1871. *Held*, that an objection as to the "incompetency of — to testify by deposition," without any specific objection to the deposition because taken before the Code of 1871, was not well taken.

Hartford Fire Ins. Co. vs. Green & Co., Miss. S. C., 5 Ins. Law Jour., 679.

12. Where an action was removed from a State to a Federal court under a mistaken impression of the party shared in by the two courts, that such right of removal existed; *Held*, that the action in the State court was not discontinued by the removal, and the plaintiff on discovering his error had a right to continue its prosecution there. The statutes of Mississippi requiring no entry of formal continuances, a technical discontinuance cannot result from a chasm in the proceedings. The discontinuance spoken of in sec. 679, Code of 1871 of Miss., is of a different character and of the nature of a *nonsuit*. The plaintiff cannot complain of an error in the rulings on demurrer from which he suffered no injury.

V. & M. R. R. Co. vs. Ragdale, 46 Miss., 458; Wilkinson vs. Cook, 44 Miss., 367.

Germania Fire Ins. Co. vs. Francis, Miss. S. C., 52 Miss., 457; 6 Ins. Law Jour., 235.

13. The words "final hearing or trial," in the act of Congress of 1867, prescribing the conditions of removal of causes to a Federal court, require the application to be made before "trial" in actions at law, and before "final hearings" in suits in equity. Such application will not be allowed after the applicant has exercised its election by standing trial in a State court, though not final.

Breery vs. Drick, 22 Grat., 489; Newton vs. Bushong, 22 Grat.; Galpin vs. Critchlow, 112 Mass., 339; Home Ins. Co. vs. Dunn, 20 Ohio St. R., 175; Alcerly vs. Vilas, 24 Wis., 165; Adams Ex. Co. vs. Trego, 35 Md., 47; Gibson vs. Johnson, Pet. C. C., 44; 14 Mass., 412; Case of Dunn vs. Ins. Co., 20 Wall., excepted to.

A foreign insurance corporation which has complied with the laws of Virginia is domiciled there, and is no longer a citizen of another State in matters of controversy with citizens of Virginia. It must sue and be sued in the State courts, and does not come

within the terms or spirit of the act of Congress relating to the removal of causes.

Continental Ins. Co. vs. Kasey, Va. S. C. A., 6 Ins. Law Jour., 277.

14. The application for removal was made under the Judiciary Act of 1789. *Held*, that a party, in order to avail himself of the right of removal from a State to a Federal court, must show upon the record that his case comes within the provisions of the statute. The petition must state facts which, taken in connection with such as already appear, entitle him to the transfer. If he fails in this, the court may proceed until judicially informed that its power over the cause has been suspended. An averment in the petition for removal that the party was at that time a citizen of a certain State is not averment that such was the case at the commencement of a suit, and does not oust the jurisdiction.

Phœnix Ins. Co. vs. Pechner, U. S. S. C., 7 Ins. Law Jour., 690.

EFFECT OF STATE PROHIBITION.

15. By the statute of Wisconsin passed in 1870, it was declared that "it shall not be lawful for any fire insurance company association or partnership incorporated by or organized under the laws of any other State of the United States, or of any foreign government, * * * to take risks, or transact any business of insurance in this State, unless * * * it shall first appoint an attorney in this State on whom process of law can be served, containing an agreement that such company will not remove the suit for trial into the United States Circuit Court, or Federal courts." *Held*, that any agreement which a citizen of one State may enter into with another State, that in no event will he resort to the courts of that State, or to the Federal tribunals in it, to protect his rights of property, is invalid, and cannot be specifically enforced. Although he may agree in particular instances to submit to arbitration, or to the decision of a single judge, yet he cannot bind himself in advance by an agreement which may be specifically enforced, to forfeit his rights at all times and on all occasions whenever the case may be presented. *Held*, that a compliance with the judiciary law of 1789, enables all citizens of other States

in which their cases are brought, to remove them from the State courts to the Federal courts, and this applies to all citizens of another State, whether they are corporations, partnerships or individuals. *Held*, that the statute of Wisconsin denying the right of citizens of other States to remove their causes from the State to the Federal courts, is repugnant to the Constitution of the United States, and is illegal and void.

Cancemi's Case, 18 N. Y. R., 128; *Nutt vs. Ham. Ins. Co.*, 6 Gray, 174; *Cobb vs. New England M. Ins. Co.*, 6 Gray, 192; *Hobbs vs. Manhattan Ins. Co.*, 56 Maine, 421; *Stephenson vs. P. F. & M. Ins. Co.*, 54 Maine, 70; *Scott vs. Avery*, 5 House of Lords Cases, 811; *Kill vs. Hollister*, 1 Wils., 129; *Thompson vs. Charnock*, 8 T. R., 139; *Lafayette Ins. Co. vs. French*, 18 How., 407; *Ducat vs. City of Chicago*, 10 Wall., 400; *Bank of Columbia vs. Okely*, 4 Wheat., 235.

Home Ins. Co. vs. Morse et al., U. S. S. C., 20 Wall., 445; 4 *Ins. Law Jour.*, 68.

16. It is doubtful whether a State has a right to impose penalties and restrictions whose effect is to oust the legitimate jurisdiction of the Federal courts.

La Fayette Ins. Co. vs. French, 18 How., U. S. C. R.; *Ducat vs. City of Chicago*, 10 Wallace, 410; *Hobbs vs. Manhattan Ins. Co.*, 56 Me., R., 412; *Cobb vs. New England Ins. Co.*, 6 Gray, 174, 192, 596; *Davis vs. Packard*, 6 Peters, 41; S. C., 7 Peters, 284.

Where the law and the penalty for its violation are part of one system, if the former is void because unconstitutional, the latter falls with it. The Wisconsin acts of 1870 and 1872, respecting the transfer of suits from the State to Federal courts must be construed together, the last prescribing penalties for violation of the first. The United States Supreme Court having decided that the act of 1870, prohibiting the removal of causes to Federal courts, was unconstitutional, the penalties prescribed by the act of 1872 are void and cannot be enforced.

Morse vs. Ins. Co., 20 Wall., 445 (4 *Ins. L. J.*, 68); *Wayman vs. Southard*, 10 Wheat., 1.

Hartford F. Ins. Co. vs. Doyle, U. S. C. C. Wis., 5 *Ins. Law Jour.*, 37.

See *Doyle vs. Continental Ins. Co.* elsewhere, for a reversal of this decision.

See Cross Index for other cases bearing on REMOVAL OF SUIT.

RENEWAL.

See **POLICY**.

See **Cross Index** for cases bearing on **RENEWAL**.

REPAIRS.

ABSTRACT OF THE LAW.

a. Ordinary repairs are essential to the preservation of property, and a necessary incident of its use, and must therefore be regarded as within the contemplation of the parties to the contract, and not a violation of the policy within any of the usual stipulations against alterations and repairs generally, even though the risk be temporarily increased, or articles specially prohibited, be necessarily used.

Dodge Co. Mut. Ins. Co. vs. Rogers, 12 Wend., 337; *Howell vs. Balt. Eq. Soc.*, 16 Md., 377; *Townsend vs. Ins. Co.*, 18 N. Y., 163; *O'Neil vs. Ins. Co.*, 3 N. Y., 122; *Parker vs. Ins. Co.*, 59 N. Y., 1.

b. But alterations or repairs, so extensive in their character as to materially change or increase the risk, or repairs so long continued as not to be within the presumed contemplation of the parties, are a violation of the prohibition which will work a forfeiture.

Harris vs. Columbian Ins. Co., 4 Ohio St., 285; *Allen vs. Massasoit Ins. Co.*, 99 Mass., 160; *Howell vs. Balt. Eq. Soc.*, *supra*; *Kern vs. Ins. Co.*, 40 Mo., 19.

c. Repairs not made with consent of insurer, will not usually defeat the policy, unless so stipulated, nor if made with knowledge of the insurer or agent. The question of materiality is for the jury.

Sandford vs. Mechanics' &c. Ins. Co., 12 Cush. (Mass.), 541; *Perry Co. Ins. Co. vs. Stewart*, 19 Penn. St., 45; *Hotchkiss vs. Germania Ins. Co.*, 5 Hun. (N. Y.), 91.

d. But mere knowledge of the agent is not a waiver of notice to the company when required, nor is an actual increase of risk necessary to a forfeiture, when the alteration is made material, or declared to be more hazardous by the terms of the policy.

Robinson vs. Mercer Co. Mut. Fire Ins. Co., 8 Conn., 459; *Sykes vs. Ins. Co.*, 34 Penn. St., 79.

See further on this subject under **POLICY**, **RISK**.

DIGEST OF RECENT CASES.

1. The agreed statement of facts showed that the boiler and machinery were cracked and in a dangerous condition ; that the safety of the property required that both should be repaired or that new ones should be put in their place ; that steam was used in the premises both for heating the same and for washing wool ; that the quantity of steam was not increased by replacing the old boiler with a new one ; that the new structure erected to cover the new boiler and fireplace was reasonable, necessary, and proper ; that the work did not interrupt the use of the mill while it was being done ; that the fire was not caused by the changes or repairs, and that the risk was not increased thereby. *Held*, that the repairs were indispensably necessary to remedy the defects in the machinery, that such buildings and machinery are liable to wear out or get out of repair, and that it is for the interest of the insurer and insured that defects which endanger the safety of the property should be repaired, and thus remove the danger of loss. *Held*, that the alteration made by erecting a new structure to cover the new boiler and fireplace, was not a greater change in the premises than the law of insurance would allow, as it was reasonable, necessary and proper.

Stokes, appl't, vs. Cox, 1 Hurls. & Nor., 540 ; Baxendale et al. vs. Harvey, 4 Hurls. & Nor., 444.

Held, that it is necessary to give notice to the company of repairs and alterations of the premises, only in the event of an increase of risk, and where there is no increase of risk it is not necessary. *Held*, that the insured was not prohibited from remedying defects in the premises or machinery insured, which arose subsequently to the granting of the policy, without his fault, or which were wholly unknown to him at the time, provided such defects were of a character to endanger the safety of the property insured, or to render the same untenable and unsafe, and unfit to be occupied for the purposes and uses described in the policy, unless it appeared that the repairs were unseasonable and increased the risk, or that the fire was owing to the repairs.

James vs. Lycoming Ins. Co., U. S. C. C., 4 Ins. Law Jour., 9.

2. The policy permitted repairs during five days in each year without notice or permit. The insured had been repairing under a special permit. Work was stopped before the expiration of the permit, but, after the expiration, was recommenced. In less than five days after the recommencement, the premises burned from other causes. *Held*, that there was no violation of the policy conditions; the additional work was authorized by the five days' clause.

Rann vs. Home Ins. Co. of Columbus, N. Y. C. A., 5 Ins. Law Jour., 15.

See Cross Index for other cases bearing on REPAIRS.

REPLACEMENT.

ABSTRACT OF THE LAW.

a. The right of replacement does not exist unless specially stipulated for in the policy.

Wallace vs. Ins. Co., 37 Penn. St., 205.

b. A refusal to permit replacement on the part of the insured, waives all claim for indemnity.

Beals vs. Home Ins. Co., 36 N. Y., 522.

c. The election to replace must be made within the time fixed by the policy, or, if no time be fixed, within a reasonable time, otherwise the insurer may be liable for the loss regardless of the subsequent replacement.

North American Ins. Co. vs. Hope, 53 Ill., 75; Heron vs. Peoria M. & F. Ins. Co., 38 Ill., 235; Sutherland vs. Ins. Co., 14 C. of Ses., 77.

d. In the case of election to replace, the insurer is not limited to the actual damages, but must restore the building substantially as it was before the fire, new for old, if necessary, regardless of the cost, and the measure of damages is not necessarily limited to the actual loss in case of failure, but may cover such consequential damages as interest and rental value. The courts, however, are not agreed as to the rule for measuring the damages.

Home Mutual Ins. Co. vs. Garfield, 60 Ill., 124; Bersche vs. Globe Mutual Ins. Co., 31 Mo., 546; Brinley vs. National Ins. Co., 11 Met. (Mass.), 195; Parker vs. Eagle Ins. Co., 9 Gray (Mass.) 152.

e. In the case of defective replacement, the measure of damages is the difference between the value of the building as erected and what it would have been if properly erected.

Parker vs. Eagle Ins. Co., supra; Ryder vs. Ins. Co., 52 Barb. (N. Y.), 447.

f. An election to rebuild converts the policy into a building contract, which may be sued on as any other contract, and damages recovered for non-performance. But it has also been held on the contrary, that the policy is not converted into a building contract, that the insured may elect to sue on the original policy, and that the measure of recovery must be limited to the actual damages.

Morrel vs. Irving Ins. Co., 33 N. Y., 423; *Home Mutual Ins. Co. vs. Garfield*, 60 Ill., 124; *Haskins vs. Hamilton Ins. Co.*, 5 Gray (Mass.), 432; *Beals vs. Home Ins. Co.*, 26 N. Y., 342.

g. An indorsement of loss payable to another, with consent of insurers, does not prevent replacement. In case the cost of replacement is less than the sum insured, the policy remains good for the balance, and in case of interference not chargeable to the insured, the insurer must bear the loss due to interference.

Tolman vs. Ins. Co., 1 Cush. (Mass.), 73; *Trull vs. Ins. Co.*, 3 Cush. (Mass.), 263; *Brady vs. N. W. Ins. Co.*, 11 Mich., 425.

DIGEST OF RECENT CASES.

1. The company elected to repair, and the insured, a carpenter, was requested to superintend it and see that the work was properly done and make any suggestions. He was present once or twice but made no complaint, and after the work was done he took possession, declaring he waived none of his rights and that the work was improperly done. There was evidence of an honest effort on the part of the company to have the work properly done. *Held*, that the conduct of the insured was a proper subject of consideration for the jury, and instruction that it was not his duty to superintend or make any suggestions, that the repairing was at the company's peril, would naturally lead the jury to discard his conduct, and was erroneous. Under an election to repair there can be no liability for rent until a reasonable time for making the repairs has elapsed.

St. Paul F. and M. Ins. Co. vs. Johnson, Ill. S. C., 77 Ill., 598; 6 *Ins. Law Jour.*, 434.

2. Where the policy provides that the company may replace at its option, the latter cannot in case of loss be said to have money in its hands, absolutely and without contingency as the trustee of the insured, and is not liable under service of trustee process by

a creditor of insured, in case with consent of latter it elects to replace on land belonging to another creditor.

Hancock vs. Collyer, 99 Mass., 187 ; *Meacham vs. McCorbitt*, 2 Met., 352.

Godfrey vs. Macomber et al., *Mass. S. J. C.*, 9 *Ins. Law Jour.*, 287.

3. A provision in a policy of fire insurance, by which in case of loss it is made optional with the insurer to repair, rebuild, or replace the property destroyed by giving notice within a certain time, constitutes a contract exclusively between insurer and insured ; neither a judgment creditor nor a mortgagee can interpose to prevent its performance. When the insurer has not given notice of an intention to repair, etc., within the time specified, no one but the insured can take advantage of it and require the payment of the insurance money instead.

Stamps vs. Commercial Ins. Co., *N. C. S. C.*, 77 *N. C.*, 209 ; 7 *Ins. Law Jour.*, 256.

The policy provided that the amount of loss was to be paid sixty days after due notice and proofs, in accordance with its terms, "unless the property be replaced or the company have given notice of their intention to rebuild or repair." There was also a provision giving the company the option to repair or rebuild within a reasonable time, on giving notice within thirty days of service of proofs, and requiring insured in such case to furnish plans and specifications. Such notice was given to insured, and plans and specifications were furnished by her, and the company refused and neglected to rebuild. The loss was payable to mortgagee. *Held*, that the contract to insure was superseded by a building contract, and the company is bound as on an original contract to build, with consideration paid in advance, and neither the amount of loss nor of insurance is controlling upon the question of recovery.

Morrell vs. Irving Ins. Co., 33 *N. Y.*, 429 ; *Beals vs. Home Fire Ins. Co.*, 36 *N. Y.*, 522.

Held, that the cause of action was in the mortgagor and not the mortgagee. *Held*, that the option to rebuild, when exercised, superseded the agreement to pay the mortgagee. *Held*, that notice to rebuild was properly served on the mortgagor. *Held*, that

the mortgagee had no right of action under the building contract; his right was limited to receipt of payment in case the option was not exercised. *Held*, that the mortgagee might perhaps intervene in equity to prevent the payment of money, or its misappropriation, in case of insufficient security, but had no other rights of interest in the character of the replacement.

Cases of *Tolman vs. Manufacturers' Ins. Co.*, 1 Cush., 73, and *Hastings vs. Westchester F. Ins. Co.*, N. Y. C. A., 7 Ins. Law Jour., distinguished.

Heilmann vs. Westchester F. Ins. Co., N. Y. C. A., 75 N. Y. 7; 8 Ins. Law Jour., 53.

5. The policy insured specific sums on a dwelling and a barn for one aggregate premium, and required the insured in case of loss to give a particular account showing the actual cash value, which was not to exceed the cost to insured of replacement. *Held*, that the testimony of witnesses shown to have had experience in building and valuing houses, as to the cost of replacement, was competent.

Bedell vs. L. I. R. R. Co., 44 N. Y., 367; *Judson vs. Easton*, 58 N. Y., 664.

Woodruff vs. Imp. F. Ins. Co., N. Y. C. A., 10 Ins. Law Jour., 125.

6. The company undertook to reinstate, and before completing the work, another fire took place. *Held*, that as the reinstatement was not finished before the second fire, the company was not entitled to any deduction for the part done.

Smith vs. Colonial Mut. F. Ins. Co., S. C. Australia.

7. An election to rebuild does not operate as the substitution of a new contract, it affects only the mode of performance, and where the plaintiffs insured are mortgagees, no averment of continuing interest is required. An averment setting forth the election and a commencement to reinstate by defendants which they refused to complete, is sufficient without averring the consent of the mortgagor; such consent will be inferred, for without it a binding election could not be made by the company. It is doubtful whether a company can refuse to settle for a loss with

mortgagees insured on the ground that the mortgage money has been paid.

The Bank of New South Wales vs. The Royal Ins. Co., Eng. S. C. J., 9 Ins. Law Jour., 928.

See Cross Index for other cases bearing on REPLACEMENT.

REPRESENTATION.

ABSTRACT OF THE LAW.

a. A representation is not a part of the contract, and an innocent mistake will not work a forfeiture, unless material to the risk.

Columbia Ins. Co. vs. Lawrence, 10 Pet., 507; *Williams vs. N. E. Ins. Co.* 31 Me., 280; *Witherall vs. Me. Ins. Co.*, 49 Me., 200; *Nicoll vs. Ins. Co.*, 3 W. & M., 329.

b. But a false representation intentionally and fraudulently made by the insured, or a misrepresentation which is material to the risk, though unintentional, will work a forfeiture.

Clark vs. Me. Mutual Ins. Co., 6 Cush., 312; *Marshall vs. Ins. Co.*, 7 Fost., 156; *Roth vs. City Ins. Co.*, 6 McLean, 324; *Cumberland Valley Mut. Protection Co. vs. Schell*, 5 Casey, 31; *Gould vs. York Co. Ins. Co.*, 47 Me., 403; *Bobbitt vs. L. L. & G. Ins. Co.*, 66 N. C., 70.

c. Representations not material to the risk, even though false, will not usually work a forfeiture in the absence of fraud.

Witherall vs. Me. Ins. Co., *supra*; *Howard F. & M. Ins. Co. vs. Cormick*, 44 Ill., 455.

d. In matters of doubt, statements will be construed as representations rather than warranties.

Garcelon vs. Hampden F. Ins. Co., 50 Me., 580; *Wilson vs. Conway Ins. Co.*, 4 R. I., 143; *Daniels vs. Hudson River Ins. Co.*, 12 Cush., 417.

e. Representations, however, when made by the stipulation a part of the contract, and the basis of insurance, have the effect of warranties when called for by the policy.

Ripley vs. Aetna Ins. Co., 3 N. Y., 136; *Commonwealth Ins. Co. vs. Monninger*, 18 Md., 352; *Abbott vs. Shawmut F. Ins. Co.*, 3 Allen, 213; *Hartford Prot. Ins. Co. vs. Harmer*, 2 Ohio St., 452.

f. Mere reference, however, to the representation in the policy, without more, or such reference as treats it simply as a representation, will not constitute a warranty, and in such case a misstatement must be material in order to work a forfeiture.

Stebbins vs. Globe Ins. Co., 2 Wall., 632; *French vs. Chenango Co. Mut. Ins. Co.*, 7 Hill, 122; *Houghton vs. Ins. Co.*, 8 Mich., 114; *Jefferson Ins. Co. vs. Cotheal*, 7 Wend., 72; *Burnett vs. Saratoga Co. Mutual F. Ins. Co.*, 5 Hill, 188.

g. Representations need not be literally accurate ; it is sufficient if they be substantially true.

Allen vs. Charleston Ins. Co., 5 Gray, 384; *Chase vs. Hamilton Mut. F. Ins. Co.*, 23 Barb. (N. Y.), 527.

h. Representations are not necessary concerning matters not particularly inquired about, and misrepresentations and misstatements concerning such matters will not usually vitiate a policy unless material to the risk.

Clason vs. Smith, 3 Wash. C. C., 156; *Daniels vs. Ins. Co.*, 12 Cush., 416.

i. Insurance may be sustained on a qualified interest, even though the insured represented himself as owner, where the nature of the interest will justify the term.

Fletcher vs. Ins. Co., 18 Pick., 419; *Tyler vs. Aetna Ins. Co.*, 12 Wend., 507; *Cumberland Valley Mutual Protection Co. vs. Mitchell*, 12 Wr., 374; *Franklin F. Ins. Co. vs. Coates*, 14 Md., 285; *Peoria M. & F. Ins. Co. vs. Hall*, 12 Mich., 202.

j. But representations, even though uncalled for, which savor of fraud, may work a forfeiture.

Columbian Ins. Co. vs. Lawrence, 2 Pet., 25; *Catron vs. Penn. Ins. Co.*, 6 Humphrey, 176; *Smith vs. Bowditch Ins. Co.*, 6 Cush., 448; *Lowell vs. Middlesex Ins. Co.*, 8 Cush., 127; *Fales vs. Conway Ins. Co.*, 7 Allen, 46.

k. Misrepresentations, when chargeable to the agent, will not forfeit the contract.

Hartford Protection Co. vs. Harmer, 2 Ohio St., 452; *Ames vs. N. Y. Union Ins. Co.*, 14 N. Y., 252; *Howard F. Ins. Co. vs. Bruner*, 11 Harris, 50; *Kelly vs. Troy F. Ins. Co.*; 8 Wis., 254; *Combs vs. Ins. Co.*, 43 Mo., 148; *Ins. Co. vs. Wilkinson*, 18 Wall., 222; *Rowley vs. Empire Ins. Co.*, 36 N. Y., 550.

See further on this subject under AGENT, APPLICATION, CONCEALMENT, FRAUD, INSURABLE INTEREST, TITLE, WAIVER, WARRANTY.

DIGEST OF RECENT CASES.

REPRESENTATION—WHAT WILL WORK A FORFEITURE.

1. No other element or stronger evidence of fraud or false representations is required to avoid insurance than other contracts. Such representations may be false or fraudulent *in presenti* so as to avoid the contract, though not in writing, nor of the nature of continuing warranties.

Prieger et al. vs. Exchange Mutual Ins. Co., 6 Wis., 89; *Keeler vs. Niagara Fire Ins. Co.*, 16 Wis., 523; *Kimball vs. Aetna Ins. Co.*, 9 Allen, 542.

The answers in the application stated that the property was incumbered for \$3,000, and was steadily profitable. The jury found specially that it was incumbered for \$4,551, and that it was not steadily profitable; also generally they found for the plaintiff.

Held, that the special findings were inconsistent with the general, and the former so far control that the verdict must be consistent with them.

Temke vs. Milwaukee and St. Paul Railway Co., 39 Wis., 449.

Held, that the facts having been found by the jury, the question of their materiality was one of law for the court. The jury cannot be allowed to give a general verdict inconsistent with the special findings on the ground that the latter are immaterial.

Held, that the test of materiality is whether the representations would influence the insurer in accepting the risk or fixing the premium. *Held*, that false representations of incumbrance are always material to the risk.

Curry vs. Com. Ins. Co., 10 Pick., 535; *Haywood vs. Mutual Ins. Co.*, 10 Cush., 444; *Patten vs. Mer. and Farm Ins. Co.*, 33 N. H., 333; *Columbia Ins. Co. vs. Lawrence*, 10 Peters, 507; *Hinman vs. Hartford Fire Ins. Co.*, 36 Wis., 159; *Fuller and others vs. Madison Mut. Ins. Co.*, 36 Wis., 604.

Held, that on the findings, judgment should have been rendered for the company. *Held*, that a finding that the company, through its agent or otherwise, had no knowledge of the additional incumbrance, is sufficient answer to the allegation that the jury might have found a waiver of the false representations.

Ryan vs. Springfield F. & M. Ins. Co., Wis. S. C., 46 Wis., 671; 8 *Ins. Law Jour.*, 659.

2. One condition of the policy was, "And any false representations made by the assured of the condition or occupancy of the property, or any material fact—material to the risk," avoids the policy. *Held*, that representations concerning a matter material to the risk contained in the application, if untrue in fact, avoids the policy, whether made intentionally or otherwise. In said application the question was, "Is the property incumbered? If so, state to what amount and the value of the premises." Answer: "Yes, mortgage \$2,000--\$10,000;" when the fact was the mortgage, which was made by the insured, was \$3,200 principal and \$240 accrued interest. *Held*, that this was a false representation material to the risk, which avoided the policy.

Citing *Glendale M'fg Co. vs. Ins. Co.*, 21 Conn., 32; *Davenport vs. Ins. Co.*, 6 Cush., 340; *Haywood vs. Ins. Co.*, 10 Cush., 444; *Brown vs. Ins. Co.*, 11 Cush., 280; *Jacobs vs. Ins. Co.*, 7 Allen, 132; *Anderson vs. Fitzgerald*, 4 House

of Lords Cas., 484; *Jeffries vs. Ins. Co.*, 22 Wall., 17. Distinguishing *Prot. Ins. Co. vs. Harmar*, 2 Ohio St., 452.

Byers vs. Farm Ins. Co., O. S. C. A., 35 O., 606; 9 *Ins. Law Jour.*, 743.

3. A representation in the application that the painting insured was from the original, by Leonardo de Vinci, and the only one which is in America, and no other copy will ever be allowed, is material to the risk, and, if fraudulently made and false, will work a forfeiture if relied on by the insurers, in case of a valued policy. *Held*, that the broker procuring the insurance, was the agent of the insured touching the representation.

Wood vs. Firemen's Ins. Co., Mass. S. J. C.

4. The contract of insurance is one in which the parties must act with the utmost good faith; no false representations which go to affect the risk, must be made; the assured must tell the whole truth, and not conceal any important fact, and he must not make any false representation as to the amount or value of stock insured. Where a party, by false representations as to the amount and value of his stock of goods, obtains a policy of insurance upon a valuation at twice the value of the goods, this, of itself, renders the policy absolutely void.

Lycoming F. Ins. Co. vs. Rubin, Ill. S. C., 79 Ill., 402.

5. When there is in the description or designation of the buildings in which the goods insured are located, such misrepresentation of a material fact as to avoid the policy, the insurers are released from responsibility.

Prudhomme vs. Salamander F. Ins. Co., La. S. C., 27 La., 695.

6. The company is not estopped from setting up a misrepresentation, because the agent might have personally examined the premises and failed to do so.

Digby vs. Amer. Cent. Ins. Co., St. Louis (Mo.) C. A.

WHAT WILL NOT WORK A FORFEITURE.

7. A material misrepresentation on the part of the insured whether through fraud or mistake, will avoid the policy.

Carpenter vs. American Ins. Co., 1 Story's R., 57.

If the misrepresentation was not material, such as would affect either the acceptance of the risk or the rate of premium, it will not avoid the policy. Whether the acceptance of the policy or premium rate has been affected or not, is a question for the jury.

Columbian Ins. Co. vs. Lawrence, 2 Peters, 25.

If the company, not relying on the statements of the insured, sends its own agent to examine the property, and issues its policy on his representations, the insured is not responsible for a misdescription, though constituting a warranty, unless he withheld information required by the obligations of good faith. Where the agent makes an examination in behalf of the company, and inserts a misdescription in the policy based both upon his own examination and the representations of the insured, if the latter were not *bona fide*, or induced the company to issue a policy which it would not otherwise have issued, the insured ought to bear the loss; but if the misdescription was *bona fide*, and immaterial, though constituting a warranty, the insured may recover.

Ins. Co. vs. Wilkinson, 13 Wall., U. S. R., 222; 1 *Ins. Law Jour.*, 607; *Masters vs. Madison County Mut. Ins. Co.*, 11 Barb., 624; *Sarsfield vs. Metropolitan Ins. Co.*, 61 Barb., 479; 2 *Am. Leading Cases*, 5th ed., p. 917.

Continental Ins. Co. vs. Kasey, Va. C. A., 4 *Ins. Law Jour.*, 208.

8. Representations in the application which are made warranties by the terms of the policy, will not become such unless stated in the policy, as required by Mass. St., 1864, c. 196.

Taylor vs. Aetna Ins. Co., 120 Mass., 254, and cases cited.

Wheeler vs. Watertown F. Ins. Co., Mass. S. J. C., 10 *Ins. Law Jour.*, 354.

9. The plaintiff sought to recover for a loss on the ground that a compromise had been effected and a release given through false representations of the agent. *Held*, that one seeking to be relieved from a contract on the ground of the alleged false repre-

sentations, must show that there were in fact false representations of a material fact upon which he relied, and upon which, from the circumstances of the case, he had a right to rely, and in doing so was misled to his injury. An action will lie for a false representation of a material fact, whether the party making it knew it to be false or not, if, when made, it was done with the intention of inducing the person to whom it was made to act upon it, and the latter does so, sustaining a damage in consequence. When an agent of an insurance company makes representations to one having a claim for a loss against the company, the parties standing in antagonistic relations to each other, that the latter had no claim or rights that he could enforce by legal proceedings, such representations are only opinion—representations upon which he had no right to rely, and if he does so rely, it must be at his own risk, because the truth or falsehood of such representations could be ascertained by ordinary diligence.

Foley vs. Cowgul, 5 Blackf., 18; *Galling vs. Newhall*, 9 Ind., 572; *Mayhew vs. Phoenix Ins. Co.*, 23 Mich., 105; *Moore vs. Turberville*, 2 Bibb, 602; *Saunders vs. Hatterman*, 2 Iredell, 32; *Farrer vs. Alston*, 1 Dev., 69; *Fulton vs. Hood*, 34 Penn., 365; *Anderson vs. Burnet*, 5 How. (Miss.), 165; *Salem India Rubber Co. vs. Adams*, 23 Pick., 256; *Hall vs. Thompson*, 1 S. & M., 443.

The charge to a jury should not only be correct, but be so distinctly adapted to the case made by the proofs, and so explicit as not to be misconstrued or misunderstood by the jury in the application of the law to the facts proven; where, however, the charge, for want of such certainty and explicitness, is calculated to confuse and mislead the jury, that is error for which a judgment may be reversed. Where in a charge in relation to false representation upon which a complaining party has a right to rely, the court enumerates as a ground for false representation upon which the plaintiff might rely, a matter which should not be considered by the jury in that relation, and but for such misdirection the jury might have arrived at a different conclusion, such charge is erroneous because misleading.

Upton vs. Tribilcock, 1 Otto, p. 50; *Fish vs. Cleveland*, 38 Ill., 243; 5 Hill 303.

If the party made the representation not knowing whether it was true or false, he cannot be considered as innocent, since a positive assertion of a fact is by plain implication an assertion of

knowledge concerning the fact. Hence, if a party have no knowledge, he has asserted for true what he knew to be false.

Stone vs. Covill, 29 Mich., 359, and cases cited; *Woodruff vs. Cramer*, 27 Ind., 4; *Fisher vs. Mellen*, 103 Mass., 503; *Taylor vs. Aston*, U. M. & W. Rep., 400; *Foard vs. McComb*, 12 Bush., 723.

But such misrepresentations touching a party's legal rights, will generally afford no sufficient reason for avoiding a contract. A charge requested by the defendant consisted of two legal propositions, one sound and the other unsound. A modification to the request by the court when applied to the sound proposition, rendered it unsound, and when applied alone to the unsound one cured the defect in it, and when applied to the request generally, it rendered the whole uncertain and ambiguous. *Held*, that charges that are uncertain and ambiguous are misleading.

L. M. & R.R. Co. vs. Wetmore, 19 Ohio St., 111.

Ætna Ins. Co. vs. Reed, O. S. C. C., 8 Ins. Law Jour., 350.

See Cross Index for other cases bearing on REPRESENTATION.

RETURN PREMIUM.

ABSTRACT OF THE LAW.

a. When the risk has not attached, or no risk has been assumed, the insured is, if without fault, entitled to a return of the premium, and he has been permitted to recover a proportionate part where, through mistake, he insured more than his own interest.

Finney vs. Warren Ins. Co., 1 Met., 16; *Holmes vs. United Ins. Co.*, 2 Johns. Cas., 329; *Forbes vs. Church*, 8 Johns. Cas., 158; *Waddington vs. Ins. Co.*, 17 Johns., 23; *Ogden vs. Ins. Co.*, 12 Johns., 114.

b. But fraud will defeat a recovery back, though no risk has been run.

Friesmuth vs. Ins. Co., 10 Cush., (Mass.), 587; *Hoyt vs. Gilman*, 8 Mass., 335; *Schwartz vs. United F. Ins. Co.*, 3 Wash. C. C., 170.

c. A contrary doctrine has also been held in England.

Wittingham vs. Thornburgh, 2 Vern., 206; *Chapman vs. Frazer*, Park on Ins., 218.

d. Mere illegality, in the absence of fraud, may, but will not necessarily defeat a recovery back.

Mount vs. Waite, 7 Johns., 434; *Henry vs. Stamford*, 4 Camp., 270; *VanDyck vs. Hewitt*, 1 East, 96.

e. If the policy has attached, there can usually be no return of premium, unless so stipulated.

Moses vs. Pratt, 4 Camp., 297; *Tyrie vs. Fletcher*, Cowper, 666; *N.Y. Ins. Co. vs. Thomas*, 3 Johns., Cas. 1.

f. If the insured is entitled to a return of premium, its return is a prerequisite to effectual cancellation.

Lyman vs. State Ins. Co., 14 Allen, (Mass.), 329; *Columbia Ins. Co. vs. Stone*, 3 Allen (Mass.), 385; *Ids. Co. vs. Webster*, 6 Wall., 129; *Ætna Ins. Co. vs. Maguire*, 51 Ill., 342.

See further on this subject under CANCELLATION.

See Cross Index for cases bearing on RETURN PREMIUM.

RIOT.

ABSTRACT OF THE LAW.

a. An organized body of troops belonging to a public enemy are not a mob or rioters, but they are a military and foreign power within the policy, though representing an armed rebellion.

Harris vs. York Mut. Ins. Co., 50 Penn. St., 341; *Marcy vs. Merch. Mut. Ins. Co.*, 19 La. An., 388.

b. Acts of the authorities in the line of their apparent duty, are not a usurpation.

City F. Ins. Co. vs. Corlies, 21 Wend., 367.

c. Disorder by a mob sufficiently large, is a civil commotion; more than three persons may constitute a mob.

Dupin vs. Ins. Co., 5 La. An., 482; *Langdale vs. Mason*, Marsh on Ins., 688.

See further on this subject under WAR.

DIGEST OF RECENT CASES.

1. Where uncontroverted evidence showed that some eight or ten men came up to a coal breaker, fired upon those in charge and burned the breaker, it was held that such facts constituted a riot within the meaning of a clause in a policy of insurance on the breaker, exempting the insurer from liability in case the property insured were destroyed in consequence of a riot, and that it

was error for the judge at *nisi prius* not to distinctly instruct the jury that a riot had been proved.

Lycoming F. Ins. Co. vs. Schwenk, Pa. S. C., 10 Ins. Law Jour., 13.

See Cross Index for other cases bearing on Riot.

RISK.

ABSTRACT OF THE LAW.

a. The risk will include whatever by necessary implication or usage attaches to the subject of insurance.

Moadinger vs. Mechanics' F. Ins. Co., 2 Hall (N. Y.), 490; Crombie vs. Portsmouth F. Ins. Co., 23 N. H., 333; Bigler vs. N. Y. Central Ins. Co., 21 Barb. (N. Y.), 635.

b. But the risk will not be extended by implication, to embrace subjects not naturally included thereunder.

Hood vs. Manhattan Ins. Co., 11 N. Y., 532; Ellmaker vs. Franklin Ins. Co., 5 Penn. St., 183; Clary vs. Protection Ins. Co., 1 Wr., 223; Lycoming Ins. Co. vs. Updegraff, 40 Penn. St., 311.

c. The risk usually takes effect from the date of the contract, or upon its completion, though no policy has been issued.

Lightbody vs. N. A. Ins. Co., 23 Wend. (N. Y.), 18; Palm vs. Ins. Co., 20 Ohio St., 539; Hubbard vs. Hartford F. Ins. Co. 33 Iowa, 325.

d. Mercantile risks will usually embrace such property as happens to be within the description at the time of loss.

Hooper vs. Hudson River Ins. Co., 17 N. Y., 424; Lane vs. Maine Ins. Co. 12 Me., 44; Crombie vs. Portsmouth Ins. Co., 26 N. H., 389.

e. Risks expressly designated in the contract as of a hazardous character, are made so by the stipulation, and no further proof is needed. But the exception of certain causes of loss from the risk assumed, excludes from the exception by implication such causes as are not enumerated, and which come within the general purview of the policy.

Ins. Co. vs. Transportation Co., 12 Wall. (U.S.), 194; Ashworth vs. Builders' Ins. Co., 113 Mass., 422.

f. But in the case of such exceptions, the burden is on the insured, to show that the cause of loss was not within them.

Lobier vs. Norwich F. Ins. Co., 11 Allen (Mass.), 336; McLoon vs. Ins. Co., 100 Mass., 472.

g. Risks when prohibited, will avoid the policy in the absence of any express or implied waiver of such prohibition, whether with or without the knowledge of insured, if such be the intention of the contract, but not otherwise.

Appleby vs. Astor F. Ins. Co.; 54 N. Y., 233; Kelly vs. Ins. Co., 97 Mass., 288; Mead vs. N. W. Ins. Co., 7 N. Y., 530; Hoxie vs. Prov. Mut. Ins. Co., 6 R. I., 517.

h. But an implied consent will waive a prohibited risk.

Harper vs. N. Y. Ins. Co., 22 N. Y., 441; *Whitmash vs. Conway Ins. Co.*, 16 Gray (Mass.), 359; *Hull vs. Ins. Co. of N. A.*, 58 N. Y., 292.

i. In marine insurance, under a voyage policy, the risk usually begins at the place indicated, and when the subject of insurance is in such condition as is contemplated by the contract.

Patrick vs. Ludlow, 3 Johns. Cas., 10; *Parmenter vs. Cousins*, 2 Camp., 235.

j. But the insurance under such policy, will not begin until the risk itself becomes of a marine character.

Kennebec Co. vs. Augusta Ins. & Banking Co., 6 Gray, 204; *Parsons vs. Mass. F. & M. Ins. Co.*, 6 Mass., 197.

k. In the case of a voyage policy, the risk usually terminates at the first port which most certainly answers the description.

King vs. Hartford Ins. Co., 1 Conn., 333; *Clark vs. Ins. Co.*, 7 Mass., 365; *Coolidge vs. Gray*, 8 Mass., 527.

l. The termination of the voyage, by abandonment, or otherwise, usually terminates the risk, except as to goods forwarded in the case of loss.

Bryant vs. Commonwealth Ins. Co., 13 Pick., 543; *Winter vs. Delaware Mutual Ins. Co.*, 30 Penn. St., 334; *Oliverson vs. Brightman*, 8 Q. B., 781.

m. A risk on the cargo usually continues until the landing of the goods.

Gracie vs. Marine Ins. Co., 8 Cranch, 75; *Mobile &c. Ins. Co. vs. McMillan*, 27 Ala., 77.

n. But the underwriters may be liable for losses occurring after the termination of the risk, if directly due to causes occurring previous to such termination.

Knight vs. Faith, 15 Q. B., 649.

o. In the case of time policies, the risk commences and ends at the time specified, irrespective of the voyage, or the place where the subject may be.

Grousset vs. Insurance Co., 24 Wend., 209; *Walker vs. Protection Ins. Co.*, 29 Me., 317; *Bradlee vs. Meriden Ins. Co.*, 12 Pet., 378.

p. The risk may attach even in case the subject of insurance be already lost, if such be the apparent intention of the parties.

Cobb vs. New England Ins. Co., 6 Gray, 192; *Sutherland vs. Pratt*, 11 M. & W., 296.

q. An increase of risk, in order to avoid the policy, must be material, and the burden of proof is upon the insurer.

Appleby vs. Astor Ins. Co., 54 N. Y., 233; *Newhall vs. Union etc. Ins. Co.*, 52 Me., 180; *Wood vs. Hartford Ins. Co.*, 13 Conn., 533.

r. But a distinct policy prohibition makes the increase material, irrespective of its real character.

Washington Ins. Co. vs. Davison, 30 Md., 91; *Allen vs. Ins. Co.* 2 Md., 111; *Jones vs. Manufacturers' Ins. Co.* 8 Cush. (Mass.), 82; *Billings vs. Tolland etc. Ins. Co.*, 20 Conn., 129.

s. In the absence of an express policy stipulation, the materiality of the increase is a question of fact for the jury.

Williams vs. People's Ins. Co., 57 N. Y., 274; *Robinson vs. Mercer County Ins. Co.*, 27 N. J., 124.

t. Unimportant or temporary increase in the risk does not work a forfeiture, even though the policy stipulate against any change whatever.

Boardman vs. Merrimac Ins. Co., 8 Cush. (Mass.), 533; *Parker vs. Arctic Ins. Co.*, 59 N. Y., 1; *Blood vs. Howard F. Ins. Co.*, 12 Cush. (Mass.), 472.

u. A general prohibition against an increase of risk, will not be extended to cover matters not distinctly within the prohibition, nor to such an incidental increase as would not naturally suggest itself to the insured as a violation of the terms of the policy.

Joyce vs. Maine Ins. Co., 45 Me., 168; *Lounsberry vs. Protection Ins. Co.*, 9 Conn., 450; *Schmidt vs. Peoria Ins. Co.*, 41 Ill., 295.

v. The increase must be made with the consent of the insured, unless the policy manifestly intended to stipulate against an increase by any parties.

Sandford vs. Mech. &c. Ins. Co., 12 Cush. (Mass.), 541; *Miller vs. Western Farmers' etc. Ins. Co.*, 1 Handy, 293; *Boardman vs. Merrimac Mutual Ins. Co.*, 8 Cush. (Mass.), 583; *Shephard vs. Union Ins. Co.*, 38 N. H., 232.

w. But an express stipulation against a change or increase of risk, manifestly without reference to the agency or knowledge of the insured, will apply to the acts of tenants, lessees, and servants, though unauthorized by the insured.

Howell vs. Balt. Eq. Soc., 16 Md., 377; *Fire Ass. vs. Williamson*, 2 Casey, 196; *Kelley vs. Worcester Mut. F. Ins. Co.*, 97 Mass., 284; *Witherell vs. Ins. Co.*, 16 Gray (Mass.), 276.

x. A change of tenants is not an increase of risk, though one may be careful and the other grossly negligent.

Gales vs. Madison Co. Mut. Ins. Co., 5 N. Y., 469.

y. The increase of risk must usually be in existence at the time of loss, though it need not necessarily be the cause of loss.

Merriam vs. Middlesex Ins. Co., 21 Pick. (Mass.), 162; *Dodge Co. Ins. Co. vs. Rodgers*, 12 Wis., 337; *Allen vs. Massasoit Ins. Co.*, 99 Mass., 160; *Girard Ins. Co. vs. Stevenson*, 37 Penn. St., 293; *Sarsfield vs. Metropolitan Ins. Co.*, 61 Barb. (N. Y.), 479.

z. Mere change of use which does not operate *per se* to increase the risk, is not a violation.

Smith vs. Merchants' etc. Ins. Co., 32 N. Y., 399; *Whitehead vs. Price*, 2 C. N. & R., 447.

aa. A mere enlargement of the building, is not *per se* an increase of risk, nor repairs when necessary and incidental to the use of the property, nor such use as is incidental to the character of the business, unless specially prohibited.

Townsend vs. N. W. Ins. Co., 18 N. Y., 163; *Grant vs. Howard Ins. Co.*, 5 Hill (N. Y.), 10; *Mickey vs. Burlington Ins. Co.*, 35 Iowa, 174.

bb. The fact that an increased rate of premium is charged for the altered use, is not decisive of the question of the increase of risk, but it is evidence when such increased rate is general among insurers.

Williams vs. People's F. Ins. Co., 57 N. Y., 274; *Rann vs. Home Ins. Co.*, 59 N. Y., 387.

cc. But a substantial change in the character of the risk, which affects its identity, as the substitution of one building for another, or an enlargement equivalent to a different structure, will work a forfeiture; nor will the fact that the increase has been offset by a corresponding decrease affect the result.

Lyman vs. State Mutual Ins. Co., 14 Allen (Mass.), 320; *Imbrey vs. Mohawk Valley Ins. Co.*, 5 Gray, 541; *Sillem vs. Thornton*, 3 El. & Bl., 863; *Hartford Protection Ins. Co. vs. Harmer*, 2 Ohio St., 452; *Luce vs. Dorchester Ins. Co.*, 105 Mass., 297.

dd. Knowledge of the insurer or his authorized representative, is generally a waiver of an increase of risk, and will excuse specific notice unless required by the policy.

Hotchkiss vs. Germania Ins. Co., 5 Hun. (N. Y.), 90; *Carroll vs. Ins. Co.*, 1 Abt., 316.

See further on this subject under PERILS OF THE SEA, POLICY, PROHIBITED RISKS.

DIGEST OF RECENT CASES.

RISK—WHEN THE POLICY COVERS IN CASE OF CHANGE OR INCREASE.

1. Insurance was effected on a stock of goods “contained in the frame building known as,” etc. When the policy was issued, plaintiff occupied one of the three stores in the building, but subsequently, by removing partitions and opening doors the three stores were made into one, and occupied by him. *Held*, that the policy covered the entire goods of the three stores, and not merely the amount in the store he originally occupied.

West vs. Old Colony Ins. Co., 9 Allen, 316.

Fair vs. Manhattan Ins. Co., *Mass. S. J. C. A.*, 4 *Ins. Law Jour.*, 114.

2. The policy provided that in case of any change in the risk not made known to the company and indorsed on the policy, it should be void. Also that no agreement, unless so indorsed, should be deemed a waiver of the conditions. The court found that steam power communicated from an engine placed in a separate building did not increase the risk. *Held*, that it was not necessary to indorse the notice of the change on the policy.

Parker vs. Arctic Fire Ins. Co., *N. Y. C. A.*, 59 *N. Y.*, 1; 4 *Ins. Law Jour.*, 609.

3. Plaintiff claiming for loss on a house as mortgagee, had, previous to the fire, purchased a mortgage on the furniture, and, without the general owner's consent, proceeded to exhibit it to parties desirous of purchasing, without the knowledge of the company. The court below instructed that if this were done by

an innocent mistake, plaintiff would be protected by Gen. Stats. of N. H., ch., 157, sec. 2; but that the increase of premium due to the increased risk should be deducted from the amount of insurance. *Held*, that whether the statute were rightly applied or not, the rule was erroneous. The true rule would be to reduce the amount of insurance to the sum which the premium would purchase at the advanced rate.

Hadley vs. N. H. Ins. Co., N. H. S. C., 55 N. H., 110; 4 Ins. Law Jour., 611.

4. Where the plaintiff had a general policy, and the indorsement was made by an employee in the absence of the officers having charge, at an hour much earlier than ordinary business hours, on a vessel past due; *Held*, that plaintiffs had a right to present themselves at the company's office whenever it was open, and to presume that the employees were authorized to do what they undertook. *Held*, that the company was liable.

Horter et al. vs. Merchants' Mutual Ins. Co., La. S. C., 28 La., 730; 5 Ins. Law Jour., 658.

5. The policy provided that the use of gasoline for light required a higher rate of premium, also that such use was an evidence of increase of risk, also that the increase of risk through a more hazardous business avoided the policy. *Held*, that in the absence of any provision making the policy void *ipso facto* upon the increase of risk due to the use of gasoline, it is not avoided by reason of such use where the loss did not result therefrom.

Mutual Fire Ins. Co. vs. Coatsville Shoe Factory, Pa. S. C., 80 Pa., 407; 5 Ins. Law Jour., 413.

6. A defense of a subsequent increase of risk from change of occupation, is not supported by alleging that the property at and after the time of insurance was used for a different purpose than that described.

Pierce vs. Cohasset Mut. F. Ins. Co., Mass. S. J. C.

7. The policy provided that it should be void if the premises "shall be occupied or used so as to increase the risk." *Held*, that

only a new and different use of the property was prohibited. The continued use of a planer which was already in use when the policy was issued, was not an increase of risk in the absence of a warranty to the contrary.

Whitney vs. Black River Ins. Co., N. Y. C. A., 72 N. Y., 118; 7 Ins. Law Jour., 477.

8. Where the insured removed the building insured about 200 feet to a place still answering the description in the policy: *Held*, that the policy was not avoided in the absence of any increase of risk. Whether there had been such increase, was for the jury.

Griswold vs. Am. Cent. Ins. Co., Mo. S. C., 70 Mo., 654; 3 Ins. Law Jour., 254.

9. The policy provided that it should be void if used for any trade, business, etc., mentioned, among which was that of a carpenter's shop; also that carpenters might repair during five days in the year. *Held*, that the business, trade, or vocation must be carried on. It is not a violation of condition as to hazardous risks if a carpenter does occasional work in a room of the building.

O'Neil vs. Buffalo Fire Ins. Co., 3 N. Y., 122.

Westchester F. Ins. Co. vs. Foster, Ill. S. C., 90 Ill., 12; 8 Ins. Law Jour., 596.

10. The agent was informed that the cotton insured was in an open shed, but was guarded night and day. *Held*, that the fact that the cotton was guarded by troops whose habits might have increased the risk, did not affect the insurance unless such habits were known to the insured and concealed from the company. At the time of effecting insurance, the guard was maintained as a favor to the insured. Subsequently the cotton was seized by the Federal authorities, and the same guard was maintained until the loss. The policy provided that if the situation or circumstances affecting the risk be altered or changed, either by change of occupancy in the premises insured, or containing property insured, or from adjacent exposure, whereby the hazard is increased, and the insured failed to notify the company, or if the title to said property shall be in any way changed, the policy should be void. *Held*, that where the seizure was unauthorized and

wrongful, the mere change in the possession and control did not require the insured to notify the company.

Snell, Taylor & Co. vs. Atlantic F. & M. Ins. Co., U. S. C. C., 8 Ins. Law Jour., 17.

11. The policy insured a wharf-boat against fire, and attached the following conditions, taken from a marine policy: "Touching the adventures and perils which the said insurance company is contented to take, and bear upon itself upon the voyage, they are of the seas, lakes, rivers, canals, fires, jettison, rovers and assailing thieves." *Held*, that the insurance covered marine perils as well as fire. *Held*, that the fact of the insurance being on a wharf-boat, "lying at the wharf," did not vitiate the policy as to other perils, and the destruction of the boat by ice after being carried away from the wharf, was within the perils insured against. *Held*, that evidence of a general custom among Ohio river men, at Evansville, to remove their boats at the approach of ice danger, to the Green River, was not evidence of a general custom at common law, which should be coextensive with the State, and compulsory upon all, and would not apply to a wharf-boat insured at the dock, and designed for warehousing; and a failure to remove such boat was not a wrongful act of negligence.

Franklin Life Ins. Co. vs. Lefton, 53 Ind., 380; Spears vs. Ward, 43 Ind., 541; Copeland vs. N. E. Marine Ins. Co., 2 Met., 432; City F. Ins. Co. of N. Y. vs. Corlies, 21 Wendell, 367; Dixon vs. Sadler, 5 M. and W., 405; Leeds vs. Mechanics' Ins. Co., 8 N. Y., 351; Equitable Ins. Co. vs. Hearn, 20 Wall., 494; Ins. Co. vs. Wilkinson, 13 Wall., 222; Cin. Mutual Ins. Co. vs. May, 20 Ohio, 211; Hill vs. Portland & R.R. Co., 55 Me., 438; Mickey vs. Burlington Ins. Co., 35 Iowa, 174; Luce vs. Dorchester Fire Ins. Co., 105 Mass., 297; Howland vs. Marine Ins. Co., 2 Cranch, 474; Hazzard vs. N. E. Marine Ins. Co., 8 Peters, 557.

Held, that the insured was not bound to remove the boat to Green River at the request of the company, and on its assurance that it would assume the risk of damage during the removal. There was no such stipulation in the policy. The insurance was against the perils at the place where the boat was lying. *Held*, that fraud could not be predicated upon the failure of the insured to do an act which he was not bound to do.

Franklin Ins. Co. vs. Humphrey, Ind. S. C., 65 Ind., 549; 8 Ins. Law Jour., 780.

12. It appearing from the undisputed evidence, that by the contract between the plaintiffs and the agent, the risk was to begin from the time when the premium was paid, which was before the loss, while the policy issued was dated after the loss, plaintiffs are entitled to a reformation of the policy.

Knox et al. vs. Lycoming F. Ins. Co., Wis. S. C., 10 Ins. Law Jour., 89.

13. A company cannot collect assessments on a policy, fixing no increased premium rate, after notice of a use prohibited by its terms, and then claim a forfeiture in case of loss. The onus is on the insurer to show that the assessments were collected before the alleged act of forfeiture.

Witte vs. West. Mut. F. Ins. Co., St. Louis (Mo.) C. A.

WHEN THE POLICY DOES NOT COVER IN CASE OF INCREASE OR CHANGE.

14. Insured may not change the use of the building so as to increase the risk, but the burden of proof is on the insurer to show such increase of risk.

Planters' Ins. Co. vs. Sorrell, Tenn. S. C., 4 Ins. Law Jour., 195.

15. The policy was upon gold which had been stowed in the hold of a vessel outside the cabin and underneath the cargo. The alleged cause of loss was from perils of the sea. The undisputed evidence of experts was that the usual place of stowage was in or under the cabin, and that stowage among the cargo and in the hold materially increased the risk, except from barratry or theft, and was material to be known by the underwriters. *Held*, that the testimony of experts as to materiality is admissible, and if there is no conflict of evidence, must govern.

McLanahan vs. Universal Ins. Co., 1 Peters, 170; 3 Kent's Com., 284.

Held, that the stowage of cargo in a safe and proper manner, in the usual place for the carriage of such goods, is an implied stipulation of the marine contract, and any breach of this warranty by which the risk is varied and the perils insured against in-

creased, vitiates the policy, although the shipper is innocent. The insurers can only be held to those risks which they have voluntarily and knowingly undertaken, and the insured cannot substitute others in their place.

Hartley vs. Buggin, 3 Doug., 39; *Maryland Ins. Co. vs. Le Roy*, 7 Cranch, 25; *Blackett vs. Royal Ex. Ass. Co.*, 2 C. & J., 244; *Taunton Copper Co. vs. Merchants' Ins. Co.*, 22 Pick., 103; *Rickards vs. Murdock*, 10 B. & C., 527; *De Costa vs. Edmonds*, 4 Camp., 142; *Merchants' Ins. Co. vs. Alger*, 32 Penn St., 330; *Milward vs. Hibbert*, 3 A. & E. N. S. Q. B., 120; *The Delaware*, 14 Wall., 579; *Appleby vs. Astor Fire Ins. Co.*, 54 N. Y., 253; *Brooks vs. Oriental Ins. Co.*, 7 Pick., 259.

Held, that the gold was stowed in an unusual place, by which the risk was materially varied and the policy was vitiated.

Leetch vs. Atlantic Mutual Ins. Co., N. Y. C. A., 66 N. Y., 100; 5 *Ins. Law Jour.*, 775.

16. The policy covered the billiard tables, liquors, fixtures, and furniture of a billiard saloon and bar-room. The billiards were kept without the license required by the laws of Massachusetts. *Held*, that the object of the insurance was to make an illegal business safe and profitable, the policy was illegal as to the billiards, and the whole business being one, the contract was wholly void.

Kelly vs. Home Ins. Co., 97 Mass., 288.

Johnson et al. vs. Union Mar. & F. Ins. Co., Mass. S. J. C., 127 Mass., 555; 9 *Ins. Law Jour.*, 13.

17. A policy of fire insurance contained a clause declaring, in substance, that in case the assured cause the property to be described other than it really is, so that it be charged at a lower premium, or if the risk be increased by means within his control, without notice and consent, the policy will be void; also, that if the risk be increased by the erection of buildings "or by the use of neighboring premises or otherwise," or if for any other cause the company shall so elect, it shall be optional with it, after notice to the assured or his representative to terminate the insurance; in that case refunding a ratable proportion of the premium. In an action upon the policy, defendant's evidence tended to show that before the loss it notified the insured and plaintiff, who, as mortgagee, was by the policy entitled to receive the insurance

in case of loss, that it elected to and did cancel the policy; defendant also tendered back the unearned premium. *Held*, that it was entirely optional with defendant when, and for what reason, to terminate the insurance, and the motive or the sufficiency of the cause could not be inquired into; and that, therefore, a refusal of the court so to charge, and a refusal to submit the question of cancellation to the jury, was error.

I. L. I. and T. Co. vs. F. F. I. and T. Co., N. Y. C. A., 66 N. Y., 119.

18. An insurance company claimed that its policy on a factory destroyed by fire was avoided by the concealment of the fact that the use of a cotton gin in the factory materially increased the risk, and was concealed from the company. The agent of the company, at a different place, informed its secretary, when on the street, away from his office, that the cotton gin was being used by the insured. On the trial, the court charged that this constituted notice to the company, and, in effect, that a forfeiture of the policy could only be claimed after notice, given within a reasonable time, of the intention of the company to claim it. *Held*, error to charge, as matter of law, that the company, through the information given to its secretary, had notice.

Texas S. C., 53 Texas, 61.

19. Neglect or omission to mention, at the time of application for a policy of insurance, the existence of a carpenter shop in close proximity to the building insured, and the subsequent erection of a new building adjoining the house insured, without notice to the company, is such an increase of risk as will vitiate a policy of insurance containing the following conditions: "The insured hereby covenants that the representations given in the application for this insurance is a warranty on the part of the insured, and contains a just, full and true exposition of all the facts and circumstances in regard to condition, situation, value, and risk of the property;" and further, that "if, after insurance, the risk shall be increased by any means whatsoever * * * and the insured shall neglect to notify the company of said increased risk, such insurance shall be void," and the case is not helped by the

knowledge of the agent where insured knew contents of application.

Smith vs. Ins. Co., 12 Harris, 320.

Set-off in diminution of risk, by removal of a building warranted in the application for insurance not to be on the premises on which the insured dwelling stood, is inadmissible against the defense of increase of risk, in violation of the covenants of the policy, by the erection of a new building on an adjoining lot, of which the insurance company had no notice.

Ins. Co. vs. Arthur, 6 Casey, 317.

Pottsville Mut. F. Ins. Co. vs. Horan, Pa. S. C., 9 *Ins. Law Jour.*, 201.

20. The policy insured "furniture, fixtures and tools used by insured in his business as renovator of furniture, clothing and carpets, and on the improvements to the building put in by him;" also, "That assured has permission to use naphtha in his business, but fire or lights are not permitted in the building, except a small stove in office." The policy further stipulated that it should be void if the risk were increased. A second stove was subsequently introduced for heating naphtha, which, according to uncontradicted testimony, materially increased the risk. *Held*, that the prohibition was plain, and the plaintiff could not claim the right to use a second stove as incidental to his business. *Held*, that while the violation would not of itself avoid the policy in the absence of an express stipulation to that effect, or of any increase of risk, the fact that there was such increase of risk worked a forfeiture, and a finding for the plaintiff must have been against the evidence. *Held*, that a provision in the policy for a renewal at the end of the term, adding that in case of any increase of risk not made known at the time of renewal, the policy and renewal should be void, was simply intended to extend the stipulation to the renewal, and did not continue the policy in force, notwithstanding an increase of risk.

Daniels vs. Eq. F. Ins. Co., Ct. S. C., 10 *Ins. Law Jour.*, 658.

21. The description in a policy, of the property insured, as a building "occupied as a dwelling and boarding house," defines the

character of the risk assumed, and is a warranty that the property, at the time of the insurance, was occupied for that purpose.

Deweese vs. Manhattan Ins. Co., 6 Vroom, 366.

Where the conditions of insurance provide that "if the assured shall cause the buildings, goods or other property insured to be described in his policy otherwise than they really are, so that they be charged at a lower premium than is therein proposed, the policy shall be of no force," the policy is not avoided simply by a misdescription of the property. To effect an avoidance of the policy, the misrepresentation must have been operative to cause the insurance to be effected at a lower rate than it otherwise would be subject to; and that question is one to be left to the jury.

Columbia Ins. Co. vs. Lawrence, 2 Peters, 46.

A written contract of insurance cannot be altered or varied by parol evidence of what occurred between the insured and the agent of the insurer at the time of effecting the insurance. Such evidence will not be received to raise an estoppel *in pais*, which shall conclude the insurer from setting up the defense that the policy was forfeited by a breach of the conditions of insurance. A policy described the property insured "as occupied as a dwelling and boarding house;" in fact it was occupied as a country tavern, and there was kept for use a billiard table in a room back of the bar-room. The property continued to be so used until the fire occurred. In the conditions of insurance, dwelling houses and taverns were classified as extra hazardous, and billiard rooms were named as specially hazardous—each being subject to higher premiums than ordinarily hazardous risks. *Held*, that evidence that the application for insurance was prepared by the agent of the insurer, and that he knew at the time of the application that the property was occupied as a tavern, and that a billiard table was kept in it for use, could not be received for the purpose of showing that under the description of a dwelling and boarding house, the parties intended to insure the premises as they were then in fact being used.

Franklin F. Ins. Co. vs. Martin, N. J. S. C. E., 40 N. J., 568; 8 Ins. Law Jour., 134.

22. A policy on a house occupied as a dwelling and store, contained an express covenant that if the insured knowingly increased the risk, or permitted it to be done, without consent of the insurer, the policy should be void. It was not denied that the insured had, after assurance, without consent of the insurer, occupied part of the house as a tin shop. The court submitted to the jury the questions whether the occupation for the purpose of a tin shop was more hazardous than the risk insured against, and whether it was so used at or immediately before the fire. *Held*, it was error to submit the question, "Was it used at or immediately before the fire?" The jury should have been instructed that if the plaintiff knowingly increased the risk, or permitted it to be done, although no work had been done in the shop for a few days before the fire, he could not recover.

Diehl vs. Adams Co. M. Ins. Co., 8 P. F. Smith, 443; Case of Mutual Fire Ins. Co. vs. Coatesville Shoe Factory, 30 P. F. Smith, 407, distinguished.

Manfrs. and Merch. Ins. Co. vs. Kunkle, Pa. S. C., 8 Ins. Law Jour., 150.

23. Where an open cargo policy had been issued by an insurance company to A., and A. reported a shipment on a named steamboat, which was accordingly entered upon the book annexed to the policy as insured thereby, and during the voyage the property was without necessity reshipped and lost; *Held*, that the insurance company, not assenting to the reshipment, was discharged.

Malinckrodt vs. Jefferson Ins. Co., St. Louis C. A., 7 Ins. Law Jour., 639.

24. Where a party, insured in a mutual insurance company, agrees with the secretary to hand to a third party, for the secretary, all money due the company, together with the policy, upon which he was to be released from all liability: *Held*, in an action for loss from fire occurring shortly afterward, the company was not liable, although its by-laws contained the following direction: "The liabilities of members shall commence and terminate at twelve o'clock on the day on which their names are entered,

withdrawn or erased," when, in fact, no erasure of the name had been made on the books of the company.

Farmers' Mut. Ins. Co. vs. Wenger, Pa. S. C., 90 Pa., 220; 8 Ins. Law Jour., 712.

25. The insured applied to the N. company to assume a risk on a saw mill carried by the C. company, which was about giving up business. The risk was taken over without filling up a new application. The mill contained a planing machine which was not stated by the insured, but was described in the original application, which, however, it did not appear that the N. company had seen. No fraud was imputed to the insured. *Held*, the risk was materially increased by the machine, and a failure to disclose its existence, together with the fact that the mill was run at night without the consent required by the policy, avoided the insurance.

Atkin vs. National Ins. Co., Montreal Court of Q. B., 8 Ins. Law Jour., 78.

26. Policy on four pumps, "at and from Ardrossan to the Alexandria steamer, ashore in the neighborhood of Drogheda, and while there engaged at the wreck and until again returned to Ardrossan by the salvage steamer, beginning the risk from the loading on board the said ship or wreck, including all risk of craft and for boats to and from the vessel and while at the wreck." *Held*, not to cover pumps while on board the wreck on a voyage to a port of safety.

Wingate, Birrell & Co. vs. Foster, Eng. Q. B. L. R., 39 Q. D., 582.

27. The policy provided for the insurance of the vessel while undergoing repairs in the Victoria Dock, "with liberty to go into dry dock." Her repairs having been completed, she was taken into the river to have the lower half of her paddle wheels, which had been removed to enable her to enter the dock, re-affixed, and the question was whether, while lying in the river for that purpose, she was still within the terms of the policy. *Held*, that, under the circumstances, the vessel was not covered by the policy, the risk of loss by fire in the river appearing to be

much greater than in the dock, where appliances for the extinction of fire were always in readiness.

Pearson vs. Com. Union Ass. Co., Eng. House of Lords, L. R. App. Cas., 498.

CONSTRUCTION CONCERNING.

28. *Held*, that the terms, "contained in" a particular building, limit the risk to the time the goods remained in the same building in which they were when the policy was issued.

Annapolis & Elk Ridge R. R. Co. vs. Balt. F. Ins. Co., 32 Md. Rep., 37.

Maryland Fire Ins. Co. vs. Gusdorf, Md. C. A., 5 Ins. Law Jour., 384.

29. The building insured was described as a "two-story frame dwelling house, on west side of King's Highway, near present terminus of Lindell Avenue, St. Louis, Mo." After insurance and before destruction, it was moved two hundred feet north. The same description was as applicable after as before its removal. *Held*, that the effect of the removal upon the risk was not a question of law but of fact, there being no condition or covenant in the policy that the building should remain where it was.

Griswold vs. Am. Cent. Ins. Co., St. Louis (Mo.) C. A., 7 Ins. Law Jour., 639.

30. A change in the property which shall not materially increase the risk, as set out in the Maine statute, has reference not to a change of title, but to the use of the property.

Waterhouse vs. Gloucester F. Ins. Co., Me. S. C., 68 Me., 409; 9 Ins. Law Jour., 15.

31. The risk on a vessel under a policy of insurance to a place generally, without any provision as to her safety there, continues until she is anchored at her port of destination in the usual place for the discharge of her cargo. The vessel was permitted by memorandum indorsement on the reinsurance policy, from Liverpool to Baltimore and United Kingdom, for an additional premium to go to Antwerp. She went direct from Baltimore to Antwerp,

where she arrived the day before the memorandum was made, and was ordered to Leith, on which voyage she was lost. *Held*, that there was no permission in the memorandum to touch at Antwerp, and no permit to go to Antwerp and thence to England, and as the vessel had not reached the usual place of discharge when the memorandum was made, the voyage was not ended and there could be no recovery of the extra premium.

Stone vs. Mar. Ins. Co., Ocean—Eng. Ex. Div. L. R., 1 Ex. D., 81.

32. Where the owner of a barn temporarily places a portable steam threshing machine in the neighborhood thereof for immediate use, and in consequence of the explosion of such machine the barn is destroyed by fire; in an action by him against the insurance company, wherein said barn was insured, to recover his loss, *Held*, that the use of such machine not being expressly prohibited by the charter and by-laws of said company, nor by the provisions of the policy, the plaintiff was entitled to recover, unless the use of said machine materially increased the risk of the company, and that whether said risk was so materially increased or not was properly left to the jury.

Inland Ins. Co. vs. Stauffer, 9 Casey, 397; State Ins. Co. vs. Todd, 2 Norris, 72.

Farmers' Mut. F. Ins. Co. vs. Moyer, Pa. S. C., 10 Ins. Law Jour., 514.

33. Objection to payment on the ground that a building attached had not been properly heated, is a waiver of the allegation that the proximity of the building had not been made known, as it was a recognition that it was included in the policy.

Castner vs. Farmers' Mut. Ins. Co., Mich. S. C., 10 Ins. Law Jour., 458.

See Cross Index for other cases bearing on Risk.

SALE.

ABSTRACT OF THE LAW.

a. A sale, in marine insurance, to be valid against the insurer, must be made by the master in good faith, and only when justified by necessity, and when good judgment is exercised. The owners and insurers must be first communicated with if possible. The necessity and good judgment must be determined according to the facts of the case.

Prince vs. Ocean Ins. Co., 40 Me., 481; *Robinson vs. Ins. Co.*, 17 Me., 131; *Hall vs. Ocean Ins. Co.*, 9 Pick., 466.

See further on this subject under ABANDONMENT, ALIENATION, INSURABLE INTEREST, MASTER, MORTGAGOR AND MORTGAGEE, TITLE.

DIGEST OF RECENT CASES.

SALE—AUTHORITY OF MASTER.

1. A master is only justified in selling, so far as concerns the underwriter, in case of stringent necessity. The rule laid down in “*Arnold on Ins.*” approved.

Colbequid Mar. Ins. Co. vs. Barteaux, Eng. Privy Council.

2. Plaintiffs were underwriters of the cargo of an Austrian ship, which, while on a voyage from Singapore to New York, struck on some rocks at Cape Tadrone, about 50 miles from Port Elizabeth, in the Cape Colony, and was given up as a total wreck. It was feared that the ship might break up at any moment; and the captain, going to the Austrian Consul at Port Elizabeth, was advised that the best course would be to sell the ship and cargo by public auction, no attempt being made to salve the ship, and no suggestion of that sort having been apparently made. The weather, luckily, continued calm, and the auction was held near the ship; and the ship and cargo were eventually sold after some brisk competition for £9,500, the cargo being treated as worth

about £9,000. The defendants, who bought, had formed themselves into a sort of syndicate for that purpose ; and they then got the cargo transhipped and taken to Port Elizabeth, and eventually sent to England, incurring a cost of about £2,000. This action related to some tin, a portion of the cargo, which was traced to England, and had since been sold by arrangement for about £12,000, without prejudice to the rights of the parties. The sale at Port Elizabeth had been under conditions of sale that any purchaser should take subject to the question of the right of the master to sell. *Held*, that the master could only sell in case of unavoidable necessity, where it was impossible to save or to transmit anything of substantial value to the owner. Plaintiffs were entitled to the proceeds of the cargo, less expenses of salvage and cost of conveyance to England.

Atlantic Mut. Ins. Co. vs. Huth, Eng. High Court of Justice.

See Cross Index for other cases bearing on SALE.

SALVAGE.

ABSTRACT OF THE LAW.

a. In fire insurance, as there is usually no abandonment, the insurer acquires no property in the salvage, but it would seem that where a total loss has been paid for, the salvage belongs to the insurer.

Bunyon on Fire Ins., 115 et seq.

b. In marine insurance, salvage can only be claimed by parties not under obligation to save the property ; but parties obligated to save property may have claims for special services rendered, beyond what their proper duty would have required.

Beane vs. Mayurkee, 2 Curtis C. C., 72; Clark vs. Dodge Healy, 4 Wash. C. C., 651; Robinson vs. The Huntress, 2 Wall. C. C., 59.

c. Salvage, in order to entitle to a claim against the insurers, must be from an extraordinary peril and not made necessary by the fault of the ship owner ; the danger must be real and certain, but need not necessarily be extreme.

The Elvira, 1 Gil., 60; The Ship Charles, 1 Newb. Adm., 329.

d. Gross misconduct on the part of the salvors forfeits the salvage claim.

The bark Island City, 1 Black (U. S.), 121; The Clarisse, 1 Swabey Adm., 129.

e. Salvage is allowed on all maritime property and interests.

The "Peace," 1 Swabey Adm., 85.

f. The amount of salvage allowed, is a matter of discretion with the courts.

Bond vs. bark Cora, 2 Wash. C. C., 80.

See further on this subject under ABANDONMENT, GENERAL AVERAGE.

DIGEST OF RECENT CASES.

SALVAGE—WHO ARE ENTITLED TO.

1. The elements essential to a salvage claim, are a marine peril to the property, voluntary service not owed as a matter of duty, and success in saving some portion of the property from the impending peril.

N. Y. Harbor Prot. Co. vs. Schooner Clara, U. S. S. C.

2. Firemen employed by the city, are not entitled to salvage for extinguishing fires in vessels lying at their wharves. It is simply in their line of duty.

Davey et al. vs. Frost, U. S. D. C. Texas.

3. The law exacts good faith of salvors, any neglect or omission of duty will *pro tanto* diminish or forfeit their salvage. But misconduct must be proved beyond a reasonable doubt. Wreckers are under the authority of the master of the distressed ship and it is their duty to obey him in respect to everything for the benefit of the property, and to disobey in everything which tends to its destruction. Each case must be governed by the special circumstances.

Farrington vs. the Ada H. Halls, Bahamas & Adm. Court.

LIABILITY OF INSURERS.

4. Policies of marine insurance were effected by plaintiff, who had undertaken at his own risk to transport the Needle to England upon the Cleopatra with the "Needle" on board, the voyage being from Alexandria to the Thames. For the purpose of insurance the property was valued at £4,000, and the insurances

were for £2,000 and £1,000. The risk insured against was simply that of total loss, and there was a "suing and laboring" clause. The plaintiff had had to pay £2,000 for salvage in respect of the *Cleopatra* being taken into Ferrol, when she had been cast off in the Bay of Biscay. He had also to pay the costs of a suit in the Admiralty Court to determine the amount of salvage; and, further, the costs of refitting at Ferrol, and of towing to London. *Held*, that the vessel having been in imminent danger, the salvage services were for the benefit of the underwriters and should be paid by them, but they were not liable for the costs of suit, refitting and towing.

Dixon vs. Sea Ins. Co. et al., Eng. C.P., 48 L. R. N. S., 538.

See Cross Index for other cases bearing on SALVAGE.

SEAWORTHINESS.

ABSTRACT OF THE LAW.

a. An implied warranty of seaworthiness at the time of sailing, enters into every insurance contract whether on vessel or cargo.

Barnewall vs. Church, 1 Caines, 217; *Warren vs. United Ins. Co.*, 2 Johns. Cas., 232; *Merch. Ins. Co. vs. Clapp*, 11 Pick., 56; *Hoxie vs. Home Ins. Co.*, 32 Conn., 21; *Hoxie vs. Ins. Co.*, 7 Allen, 211.

b. But the rule may be different under a time policy, or when the vessel is already at sea when the risk attaches.

Small vs. Gibson, 16 Q. B., 141; *Jenkins vs. Heycock*, 8 Moore, P. C. C., 351; *Faucus vs. Sarsfield*, 6 E. & B., 192.

c. The burden of proof of seaworthiness is on the insured if the facts do not otherwise sufficiently explain the loss, but in the absence of anything to the contrary, the vessel will be presumed seaworthy at the beginning of the risk.

Talcott vs. Ins. Co., 2 Johns., 124; *Moses vs. Ins. Co.*, 1 Duer., 159; *Watson vs. Ins. Co.*, 2 Wash. C. C., 480; *Paddock vs. Ins. Co.*, 11 Pick., 226; *Treat vs. Ins. Co.*, 56 Me., 231.

d. Seaworthiness is satisfied if the vessel be in a fit condition to meet the ordinary perils of the voyage; but if overloaded, or rotten, or leaky from the start, or so loaded as to compel a jettison in ordinary weather, or not sufficiently provided with the usual appliances or men for safety, she is unseaworthy.

Amer. Ins. Co. vs. Ogden, 15 Wend., 533; *Daniels vs. Harris*, 10 L. R. C. P., 1; *Wilkie vs. Geddes*, 8 Dow, 57; *Miller vs. Ins. Co.*, 2 McCord, 336; *Abbott vs. Broome*, 1 Caines, 292; *Fontaine vs. Ins. Co.*, 10 Johns. Cas., 58; *Treadwell vs. Ins. Co.*, 6 Cow., 270.

e. Subsequent unseaworthiness will not usually work a forfeiture unless chargeable to the insured.

Cudworth vs. South Carolina Ins. Co., 4 Rich., 416 ; Merch. Ins. Co., vs. Morrison, 62 Ill., 242 ; Lockwood vs. Ins. Co., 46 Mo., 71 ; Gazzam vs. Ins. Co., 6 Ohio, 71 ; Capen vs. Ins. Co., 12 Cush., 517.

See further on this subject under JETTISON, NEGLIGENCE, PERILS OF THE SEA.

DIGEST OF RECENT CASES.

SEAWORTHINESS—WHAT CONSTITUTES.

1. Insurance was effected on wine in casks, on or under deck. The wine was jettisoned in bad weather by staving in the casks, but the rest of the cargo arrived safely. *Held*, that there was an implied warranty that the vessel was seaworthy for the voyage she was about to undertake, loaded as she was with said cargo, and that in considering seaworthiness, the jury should consider the nature of the cargo ; and if the vessel could only be made seaworthy by the destruction of said cargo, she was unseaworthy, no matter how easy the cargo might be destroyed.

Daniels vs. Davis, English Common Pleas, 5 Ins. Law Jour., 238.

2. Absence of a carpenter or any one capable of making repairs, may render a ship unseaworthy in voyages where such parties would properly make up the equipment.

Clarkson vs. British F. & M. Ins. Co., Eng. High Court of Justice.

3. Although a ship is *prima facie* presumed to be seaworthy, yet if she goes down or leaks in ordinary weather and within a short time after starting on her voyage, without encountering any peril sufficient to account for it, the burden of proof is on insured to show that she was seaworthy at the time of leaving port.

Pickup vs. Thames and Mersey Mar. Ins. Co., Eng. High Court of Justice, L. R., 3 Q. B. D., 594.

LIABILITY OF THE INSURER.

4. Where property is insured with knowledge that it is on a government vessel exempt from state navigation laws, an allegation of unseaworthiness on account of the incompetency of the pilot cannot be heard, nor can the general government be held liable as a carrier.

Hathaway et al. vs. St. Paul F. & M. Ins. Co., U. S. C. C. Ill.

5. An implied warranty of seaworthiness enters into every policy of insurance on vessel or on freight. Thus, when the owners of a vessel insure freight and the vessel is lost, the insurers may resist the payment of the sum for which the freight has been insured, on the ground that the vessel was unseaworthy. If the insurers have received the payment of premium on some specific amount indorsed on the policy as the amount insured for, they will be liable for that amount.

Donnelly & Son vs. Merch. Mut. Ins. Co., La. S. C., 28 La., 439.

6. A vessel not properly manned, may be unseaworthy, but if this does not occasion loss, it will not prevent recovery. But if she springs a leak without apparent cause, it is presumptive of unseaworthiness. The contract of affreightment is an implied warranty of seaworthiness.

The Planter, U. S. C. C. Ala., 2 Wood's R., 187.

7. The vessel, a steamship, being intended for service on smooth water, was of peculiarly light construction, and on being sent to her destination, was insured at a lighter rate of premium than usual. She broke in two and was lost during a storm on the way. A jury having found that she was not seaworthy as an ordinary sea-going vessel nor as seaworthy as she might have been made by ordinary means; *Held*, that knowledge by the underwriters of the nature and design of the vessel, was not an implied warranty of seaworthiness, and the policy was void.

Turnbull et al. vs. Janson, Eng. Sup. Court of Judicature.

See Cross Index for other cases bearing on SEAWORTHINESS.

SECRETARY.

See OFFICER.

See Cross Index for cases bearing on SECRETARY.

SERVICE.

DIGEST OF RECENT CASES.

SERVICE—REQUISITES TO A VALID.

1. Under the Pennsylvania act of April 14, 1873, service of process on a foreign insurance company must be on the agent or actuary of the company designated by it to receive service. Service on any local or soliciting agent not so designated, is invalid.

Liblong vs. Kansas Fire Ins. Co., Pa. S. C., 92 Pa., 413; 6 Ins. Law Jour., 73.

2. A resolution of a foreign corporation, filed pursuant to a State statute, authorizing its agent "to acknowledge service of process for and in behalf of such company, and consenting that service of process upon any agent shall be taken and held to be as valid as if served upon the company or association," amounts to an agreement for a constructive presence within such State; and a Federal court may obtain jurisdiction over such corporation by service upon its agent.

Citing *Bank of Augusta vs. Earle*, 13 Pet., 519; *Paul vs. Virginia*, 8 Wall., 168; *O. & M. R. R. Co. vs. Wheeler*, 1 Black., 286; *R. R. Co. vs. Harris*, 12 Wall., 81; *Day vs. Newark India Rubber Mnfg. Co.*, 1 Blatch., 628; *Main vs. Second National Bank*, 6 Biss., 26; *Lafayette Ins. Co. vs. French*, 18 How., 404; *Railroad Co. vs. Harris*, 12 Wall., 81; *Knott vs. Southern Life Ins. Co.*, 2 Wall., 479.

Fonda vs. Brit. Am. Ins. Co., U. S. C. C., Mich., 7 Ins. Law Jour., 468.

3. Where the principal office or place of business of the corporation is in Missouri, it is domesticated and amenable to jurisdiction by common process of summons there; but when its office or place of business is elsewhere, it must be proceeded against by attachment as a non-resident.

Baile vs. Equitable F. Ins. Co., Mo. S. C., 68 Mo., 617.

4. Where the statute requires service to be made upon the last acting or designated agents of the company in case the company has withdrawn or ceased business in the State, the reference is to the agents last acting in the entire State, and not to such as may have been dispensed with in the particular county where plaintiff resides, provided others are in the jurisdiction, upon whom service can be made.

Mich. State Ins. Co. vs. Abens, App. Court of Ill.

See Cross Index for other cases bearing on SERVICE.

SET-OFF.

ABSTRACT OF THE LAW.

a. The right to a set-off is purely statutory. The general rule is that mutual liquidated debts may be offset under the statute when the rights of third parties are not injured, and in the case of insurance companies, a liquidated sum due the company may be offset against an unliquidated sum. Loss claims may usually be offset against independent debts due the company, even in case of insolvency, but not against claims for assessments or stock subscriptions, nor when such debts are purchased with a knowledge of insolvency. The company may, however, offset claims for assessments or subscriptions against loss claims.

Holbrook vs. Amer. F. Ins. Co., 6 Page (N. Y.), 220; Long vs. Pa. Ins. Co., 6 Penn. St., 421; Receivers of Globe Ins. Co., 2 Edw. (N. Y.), 625; Hillier vs. Alleghany Co. Mut. Ins. Co., 5 Penn. St., 470; Lawrence vs. Nelson, 21 N. Y., 158; Nevins vs. Rock F. Ins. Co., 5 Fost. (N. H.), 22.

DIGEST OF RECENT CASES.

1. Where it is agreed that a premium note may be set off against a loss, a loss may be set off against the note, the intention being that the allowance should be mutual.

Livermore vs. Ins. Co., 2 Mass., 292; Warren vs. Ins. Co., 104 Mass., 518; Columbia Ins. Co. vs. Bean, 113 Mass., 541.

Union Mut. Mar. Ins. Co. vs. Howes, Mass. S. J. C.

See Cross Index for other cases bearing on SET-OFF.

SLIP.

ABSTRACT OF THE LAW.

a. The slip in marine insurance, is the written application of the insured, and is governed by the general principles controlling the application in fire insurance. It is usually simply a memorandum of the contract, and cannot be used to vary the written policy when not made a part thereof, except in case of ambiguity or misrepresentation.

Dow vs. Whetten, 8 Wend., 160.

b. But an acceptance of the slip by the underwriters in the usual way, constitutes a binding contract.

Woodruff vs. Columbus Ins. Co., 5 La. An., 697; Perkins vs. Ins. Co., 4 Cowan, 645.

See further on this subject under APPLICATION.

See Cross Index for cases bearing on SLIP.

STATUTE.

DIGEST OF RECENT CASES.

STATUTE—CONSTRUCTION OF.

1. It is the duty of commissioners of insurance in Wisconsin, to prosecute companies or their agents for penalties incurred by them under Sec. 1974, Rev. Stats. 2. Said Sec. 1974 provides that no corporation doing insurance business in this State, against which a final judgment shall have been recorded in any court of this State, shall, after sixty days from the rendition of such

judgment, and whilst the same remains unpaid, issue any new policy; and ch. 171 of 1879 requires the commissioner of insurance to revoke the authority of any foreign insurance company to do business in this State, upon its persistent violation of any law regulating such corporation. *Held*, that where, after judgment against a foreign insurance company in a lower court, it has in good faith taken an appeal and given the required undertaking for payment of the judgment if affirmed, it is under no obligation to pay the judgment pending the appeal, and the statutes cited do not apply.

State vs. Spooner, Wis. S. C., 9 Ins. Law Jour., 7.

2. The words "joint stock company," as used in the statutes of Massachusetts, refer to companies organized under general laws, and not to those incorporated by special statute. The words have never been used as descriptive of a corporation created by special act of the legislature and unauthorized to issue certificates of stock; they describe a partnership of many persons acting under articles of association for the purpose of carrying on a particular business, and having a capital stock divided into shares transferable at the pleasure of the holder.

Oliver vs. Liverpool and London and Globe Life and Fire Ins. Co., 100 Mass., 531; S. C., 10 Wall., 566; Hoadley vs. Essex, 105 Mass., 529; Taft vs. Ward, 106 Mass., 518.

A company incorporated under a special charter containing the usual provision subjecting it to all the duties, liabilities, and restrictions set forth in the general laws relating to corporations and insurance companies, is not subject to the provisions of St. 1872, c. 375, and St. 1874, c. 222, limiting the dividends of joint-stock, fire, and marine companies to ten per cent in any one year.

Attorney General vs. Merc. Mar. Ins. Co., Mass. S. J. C., 6 Ins. Law Jour., 531.

3. The Indiana statute requires the filing of a renewal certificate in January and July of each year, by the agent, as a requisite for authority to do business. *Held*, that the agent is allowed the entire month for complying with the requirement, and during that period is entitled to do business on the certifi-

cate previously filed. *Held*, that a note given for a policy issued in January before the filing of a renewal certificate, was valid.

American Ins. Co. vs. Pettijohn, Ind. S. C., 62 Ind., 382; 8 Ins. Law Jour., 93.

4. The reciprocal law of 1869 has no connection with the tax laws of Georgia, but simply imposes upon foreign companies seeking to do business in Georgia the same obligations, etc., as are imposed upon Georgia companies seeking to do business in other States.

Goldsmith v. Home Ins. Co., Ga. S. C., 62 Ga., 379.

5. Where the company agreed, as a condition of admission to do business in the State, to abstain from appeal to a Federal court, and its license having been revoked on account of the violation of the condition, the company claimed the right to continue acting under the license, on the ground that the condition was void; *Held*, that the fact that a suit affecting the prerogatives of a State has been settled by a State officer is immaterial as affecting the jurisdiction of an appellate court, where the subject matter is one affecting the sovereignty, franchises or prerogative of the State.

Cases of Attorney General vs. R. R. Co's, 35 Wis., 425; Attorney General vs. Eau Claire, 37 Wis., 340; State vs. Baker, 38 Wis., 71; State vs. Supervisors, ib., 554, distinguished.

Held, that the omission in a statute to provide for notices to parties in interest, does not render the statute invalid. *Held*, that the revocation of the license is a ministerial act. In *Morse vs. Home Ins. Co., 20 Wall., 445*, it was decided that the right of a corporation to remove a cause from a State to a United States court might be exercised, even though the party had agreed that the cause should not be removed, and that the agreement not to remove was not rendered valid by a State law authorizing it. Under this decision it follows that the jurisdiction of the State court was ousted on presentation of the petition for removal.

Gordon vs. Longest, 16 Pet., 97; Kanouse vs. Martin, 15 How., 198; Ins. Co. vs. Dunn, 19 Wall., 214.

The constitutionality of the State law, however, was not in issue, and the decision that it was invalid was extra-judicial.

Cohen vs. State of Virginia, 6 Wheat., 264; *Ex parte* Christy, 3 How., 292; Peck vs. Jenness et al., 7 How., 612; Carroll vs. Carroll, 16 How., 275.

A State statute providing that a corporation shall be compelled to file with a State officer, as a condition precedent to its doing business in the State, an agreement not to remove causes in which it is a party, is within the power of the State, even if the agreement is not valid in law. Such a statute is purely a matter of State policy, and not subject to Federal control in any form.

Cooper vs. Telfair, 4 Dallas, 14; Parsons vs. Bedford, 3 Pet., 433; U. S. vs. Coombs, 12 Pet., 72; Carpenter vs. Pennsylvania, 17 How., 456; Hannay vs. Eve, 3 Cranch, 242; Saunderson vs. Rowles, 4 Burr., 2064; Ins. Co. vs. French, 18 How., 404; Paul vs. Virginia, 8 Wall., 168; Ducat vs. Chicago, 18 Wall., 410; Ins. Co. vs. Mass., *ib.*, 566; Osborn vs. Mobile, 16 Wall., 479; Ducat vs. Chicago, U. S. S. C., 1870; Bank of Augusta vs. Earle, 13 Pet., 519.

If such a statute is unconstitutional, the State officer has no power to issue a license to the corporation, and should be commanded to revoke any license he may have issued.

Slauson vs. Racine, 13 Wis., 398; Lynch vs. Economy, 27 Wis., 69; State vs. Dousman, 28 Wis., 541.

A State cannot be sued indirectly by proceedings against one of its officers, and where so sued in a Federal court, the jurisdiction of the State courts will not be ousted. Even if the Federal court has granted an injunction, the State court may issue a writ of mandamus to the party enjoined, commanding him to violate the Federal writ.

Kent, vol. i., 298; Georgia vs. Brailsford, 2 Dallas, 402; Cohen vs. Virginia, 6 Wheat., 264; Chisholm vs. Georgia, 2 Dallas, 419; 1 Kent, 296; Hollingsworth vs. Virginia, 3 Dallas, 378; United States vs. Peters, 5 Cranch, 115; Osborn vs. Bank of U. S., 9 Wheat., 739; Governor of Georgia vs. Madrazo, 1 Peters, 110; Kentucky vs. Dennison, 24 How., 66; Dodge vs. Woolsey, 18 How., 331; State Bank vs. Knoop, 16 How., 369; Davis vs. Grey, 16 Wall., 203, and cases there cited; Gelpecke vs. Dubuque, 1 Wall., 175.

State vs. Doyle, Wis. S. C., 6 Ins. Law Jour., 209.

See Cross Index for other cases bearing on STATUTE.

STOCK.

See CAPITAL STOCK, GOODS AND MERCHANDISE.

See Cross Index for cases bearing on STOCK.

STRANDING.

ABSTRACT OF THE LAW.

a. Stranding is a peril of the sea within the policy.

Firemen's Ins. Co. vs. Powell, 13 B. Mon., 311.

b. But otherwise if the vessel grounds in a harbor where such a result is expected, through the usual operation of the tides.

Kingsford vs. Marshall, 8 Bing., 453.

c. Length of time is no essential element, provided there be a substantial grounding which arrests the vessel, but it is not enough that she merely touch.

Lake vs. Columbus Ins. Co., 13 Ohio, 48 ; *Harman vs. Vaux*, 3 Camp., 429.

See Cross Index for cases bearing on STRANDING.

SUBROGATION.

ABSTRACT OF THE LAW.

a. Subrogation is not usually a right belonging to the insurer in his own behalf, independently of the right of the party insured; the claim must be based upon the privity of contract between the insurer and the insured, and on claims which the latter would have against the wrong doer; but a contrary doctrine has been held as to carriers.

Rockingham Ins. Co. vs. Boscher, 39 Me., 253; *Quebec F. Ins. Co. vs. St. Louis*, 22 Eng. L. & Eq., 73; *Connecticut Mutual Ins. Co. vs. R. R. Co.*, 25 Conn., 265; *Hall vs. R. R. Co.*, 13 Wall., 367.

b. But rights against the wrong doer, attaching to the insured, pass to the insurers, who upon making good the loss, may recoup in the name of the assured.

Hall vs. R.R. Co., 13 Wall. (U. S.), 367; *Peoria F. & M. Ins. Co. vs. Foster*, 37 Ill., 333; *Quebec Fire Ins. Co. vs. St. Louis*, *supra*.

c. The acceptance of indemnity from the insurer, operates as an equitable assignment of the claim of the insured against the wrong doer; the latter can claim no benefit from such payment.

Mason vs. Sainsbury, 3 Doug., 61; *Webb vs. Rome R.R. Co.*, 49 N. Y., 421; *Monmouth Co. Ins. Co. vs. Hutchins*, 21 N. J. Eq., 107.

d. The insured, however, is entitled to but one satisfaction in case of recovery against the wrong doer.

Collins vs. R.R. Co., 5 Hun. (N. Y.), 503; *Merrick vs. Brainard*, 25 N. Y., 208.

e. The release of the wrong doer by the insured, if known to the insurer before the payment, is effectual against the latter.

Connecticut Ins. Co. vs. Erie R.R. Co., 10 Hun. (N. Y.), 59.

f. But such release is invalid against the insurer who has paid the loss in ignorance of it.

Honore vs. Lamar Ins. Co., 51 Ill., 409.

g. The right of subrogation has usually been held to exist in the case of mortgage insurance, when the contract is effected in the name of the mortgagee, or exclusively for his benefit, provided the whole mortgage debt be discharged by the insurer, but not otherwise, and the insurer, where the loss is less than the debt, may insist upon the payment of the whole and the assignment of the mortgage, whether stipulated for in the policy or not.

Kernochan vs. N. Y. Bowery Ins. Co., 17 N. Y., 428; *Springfield F. & M. Ins. Co. vs. Allen*, 43 N. Y., 389; *Sussex Co. Ins. Co. vs. Woodruff*, 26 N. J., 541; *Ætna Ins. Co. vs. Tyler*, 16 Wend. (N. Y.), 383.

h. But a contrary doctrine has been held in Massachusetts.

Suffolk etc. Ins. Co. vs. Boyden, 9 Allen (Mass.), 123.

i. Whether in the absence of a special stipulation as to the assignment, the mortgagee is entitled to double satisfaction, the courts are not agreed.

Honore vs. Lamar Ins. Co., 59 Ill., 409; *Robert vs. Traders' Ins. Co.*, 17 Wend. (N. Y.), 631; *King vs. Sun Mutual F. Ins. Co.*, 7 Cush. (Mass.), 1.

j. Where the insurance is primarily for the benefit of the mortgagor, whether in the name of the mortgagee or otherwise, the right of subrogation does not exist.

Holland vs. Smith, 6 Esp., 11; *Stokes vs. Coffee*, 8 Bush. (N. Y.), 533; *Kernochan vs. New York Bowery Ins. Co.*, 17 N. Y., 423; *Springfield M. & F. Ins. Co. vs. Allen*, 43 N. Y., 389.

k. It is not necessary that the mortgagor should have paid the premium, or even expressly stipulated for its payment, in order to defeat the right of subrogation; it is sufficient if he is liable to the mortgagee therefor.

Kernochan vs. N. Y. Bowery Ins. Co., *supra*.

l. Whether the express stipulation regarding assignment will defeat the rights of the mortgagor, is not fully settled.

See *Foster vs. Van Reed*, 5 Hun. (N. Y.), 321; and same case in 8 Ins. Law Jour., 201.

DIGEST OF RECENT CASES.

SUBROGATION—WHEN THE INSURER IS ENTITLED TO.

1. An insurance company compelled to pay a loss, is entitled to be subrogated to the rights of the insured against the party causing the loss, and may prosecute such claim after payment without any formal assignment from the insured in his name, and he may not defeat such right by any release or discharge of the party doing the damage.

Hart et al. vs. Western R. Co., 13 Metc., 99; Monmouth County Fire Ins. Co. vs. Hutchinson et al., 21 N. J. Eq., 107; Conn. Fire Ins. Co. vs. Railway Co., 73 N. Y., 399.

Where two or more companies are concerned, it is proper that the matter should be litigated in one action to avoid a multiplicity of suits, and a joinder of the parties for this purpose will be sustained.

School District vs. Edwards et al., 46 Wis., 150.

Swarthout et al. vs. Chicago & N. W. R. R. Co., Wis. S. C.

2. The mortgagee of a vessel, who had never been in possession, recovered in an action against marine underwriters, upon a policy insuring his interest, judgment for a total loss by the barratry of the master appointed by the mortgagor, and afterwards recovered judgment in an action of tort for the conversion of the vessel by the same act of barratry. Both judgments were satisfied. *Held*, that the underwriters were entitled to be subrogated to the rights of the mortgagee in the damages recovered by him for the injury to his interest in the property, and that this right was not affected by their refusal, while the action of tort was pending, to accept an offer by the mortgagee to transfer the control of that action to them, upon the condition that they should pay the expenses already incurred therein, and without prejudice to rights of the mortgagor in the judgment to be recovered.

Mercantile Mar. Ins. Co. vs. Clark, Mass. S. J. C., 118 Mass., 288.

3. If a loss, under a policy of fire insurance, is occasioned by the wrongful act of a third person, the insurer, upon payment, is

subrogated to the rights and remedies of the assured, and may maintain an action against the wrong doer. If the assured receives the damages from the wrong doer before payment by the insurer, the amount so received will be applied *pro tanto* in discharge of the policy. If the insurer after payment of the damages by the wrong doer to the assured, voluntarily pays the policy, he cannot maintain an action against the wrong doer. If the wrong doer pays the assured after payment by the insurer, with knowledge of that fact, it is a fraud upon the latter, and will not protect the wrong doer from liability to him. Plaintiff issued a policy of insurance for \$1,500 to M. upon certain buildings, which were subsequently destroyed by fire through the negligence of defendant; the buildings were worth \$3,400. M. received from defendant \$1,800 for his damages, he executing a release of all claims and demands for the loss; the release contained a statement that the settlement was not intended to discharge plaintiff from any claim of M. against it, but simply as a full settlement and discharge of defendant. Plaintiff thereafter paid the amount of the insurance. In an action to recover the amount paid, *Held*, that the clause in the release as to the claim against plaintiff, was in the nature of a proviso or exception from the general purview of the release, limiting its effect to a release of the balance, retaining the claim against plaintiff, and excepting its rights to a remedy over; and, therefore, as to the plaintiff, the release was of no effect, it could not have interposed it as a defense upon the policy, and its right to subrogation was not affected thereby. As to whether the effect of the release would have been different if the assured had received the full amount of the loss, *quære*. Also, *Held*, that the action was properly brought in the name of plaintiff.

Conn. F. Ins. Co. vs. Erie R. Co., N. Y. C. A., 73 N. Y., 399.

4. The company which has paid a loss, is entitled to be made party to a suit by insured against the wrong doer for the damages.

Hartford Ins. Co. vs. Pennell, App. Court of Ill. 1st Dist., 1879.

5. The insurer is entitled to share the benefit of a recovery by insured against the R. R. Co. wrong doer in causing a fire, and should share the expense in proportion to the amount to which it is entitled.

Hendrickson vs. R. R. Co., Columbia Co. (Pa.) C. P., 1875.

6. The claimant by pleading to the merits, has waived any irregularity existing on account of filing the libel at a time when the vessel was not within the district. The libellants having paid the amount of insurance upon the freight which is alleged to have been lost through the fault of the steamboat Lake Superior, in a collision on the Mississippi, are by proper proceedings subrogated to all the rights of the original owners, and they have full authority to institute these suits to enforce their several claims. Where the boat had been sold to other parties, claimants and libellants, defending and attempting a settlement, and the libel was filed within two years after the collision, the claim is not stale.

St. Paul Fire and Marine Ins. Co. et al. vs. The Steamboat Lake Superior, U. S. D. C. Minn., 5 Ins. Law Jour., 73.

WHEN THE INSURER IS NOT ENTITLED TO.

7. The policy insured the interest of P., payable to C., a judgment creditor, having an inchoate title by virtue of a sheriff's sale. The time allowed for redemption by other judgment creditors lapsed after the fire, and C. obtained full title by virtue of sheriff's deed. *Held*, that the company could not be subrogated to the rights of C. against P. or the property, whether C. was more or less than indemnified.

Cone vs. Niagara Fire Ins. Co., N. Y. C. A., 60 N. Y., 619; 4 Ins. Law Jour., 729.

8. Where in a collision both vessels were owned by the insured, the rule that an underwriter is subrogated to the rights of the insured as against a stranger, does not apply if the collision was caused by mere negligence on the part of the officers and crew of the injuring vessel. If the injury was caused, however, by willful wrong or fraudulent act on their part, then such act was avail-

able as a defense to an action on the policy with or without an abandonment.

Globe Ins. Co. vs. Sherlock, Ohio S. C., 25 Ohio, 50 ; 4 Ins. Law Jour., 515.

9. Grain was shipped at Chicago, consigned to parties in Pa., on account of which bills of lading were issued, providing that the vessel owner should not be liable for damage by fire, collision, or the dangers of navigation, and that in case of loss whereby any liability occurred, the carrier should have the benefit of any insurance ; insurance was effected on the grain. The vessel was stranded in a fog, and payment was made as for a total loss. In a suit by insurer against the carrier for reimbursement ; *Held*, that stranding, which was a peril of the sea, was the proximate cause of the loss, while contributory negligence of the master was the remote cause. *Held*, that the bills of lading constituted the contract between carrier and shipper ; that the carrier could limit its common law liability by special contract, but not its liability for negligence ; that in the absence of special contract the insurer is entitled to subrogation. But the carrier could indirectly by contract, secure through the shipper protection against a peril insured against, though remotely due to its own negligence. The company was subject to such special contract through dealing with property subject to bills of lading, and was not entitled to subrogation.

Phœnix Ins. Co. vs. Erie & W. T. Co., U.S. D. C. Wis.

See Cross Index for cases bearing on SUBROGATION.

SUCCESSIVE LOSSES.

See POLICY.

See Cross Index for cases bearing on SUCCESSIVE LOSSES.

SURETY.

DIGEST OF RECENT CASES.

1. In the absence of any special stipulation, the company is not obligated to notify the surety of the failure of the agent to make good his monthly balances.

Hartford F. Ins. Co. vs. Moss., Tenn. S. C.

See Cross Index for other cases bearing on SURETY.

SURVEY.

ABSTRACT OF THE LAW.

a. Unless otherwise stipulated, the survey is simply descriptive of the insured premises ; it may be made by parol, and has the effect only of a representation.

Denny vs. Conway Stock & Mutual Company, 13 Gray (Mass.), 492 ; *Suglen vs. Farmers' Ins. & Loan Co.*, 13 Wend. (N. Y.), 92 ; *Globe Ins. Co. vs. Cooper*, 50 Penn St., 331.

b. A mere reference in the policy, to the survey, for a fuller description, or to a former survey, as a survey on file, in the absence of any new survey, will not make it a warranty unless such can be fairly inferred from the nature of the reference.

Clinton vs. Hope Ins. Co., 45 N. Y., 434 ; *Jefferson Ins. Co. vs. Cotheal*, 7 Wend. (N. Y.), 752 ; *Upton vs. Farmers' Ins. and Loan Co.*, 13 Wend. (N. Y.), 92 ; *Commonwealth Ins. Co. vs. Monninger*, 18 Ind., 352.

c. In order to make the survey a warranty, and part of the contract, under a stipulation to that effect, it must appear that the insured consented to its adoption as such by the insurer.

Denny vs. Conway Stock Mutual F. Ins. Co., 13 Gray (Mass.), 492 ; *Clinton vs. Hope Ins. Co.*, 45 N. Y., 434 ; *Kentucky and Louisville Ins. Co. vs. Southard*, 8 B. Mon., 637.

See further on this subject under APPLICATION, DESCRIPTION, REPRESENTATION, WARRANTY.

DIGEST OF RECENT CASES.

1. Plaintiff applied for insurance to the People's Ins. Co., and for that purpose a survey was presented and filed in the office of that company. The People's procured a policy for a portion of the insurance in the Phoenix, which contained a condition that when a policy is issued upon a survey and description, they shall be deemed a part of the policy, and a warranty on the part of the insured, and a further clause that it was made and accepted in reference to the terms and conditions annexed, which were to be resorted to to explain the rights and obligations of the parties; *Held*, that the reference to the survey was not merely for the purpose of securing a definite description, but the insurance was based upon the survey.

Steward vs. Phoenix F. Ins. Co., N. Y. Superior Court, 4 Ins. Law Jour., 874.

See Cross Index for other cases bearing on SURVEY.

TAXATION.

DIGEST OF RECENT CASES.

TAXATION—WHAT IS VALID OR LEGAL.

1. The Louisiana act No. 42, March 3, 1871, sec. 615; and act No. 14, March 5, 1872, sec. 14; exempting liability after payment of \$1,000 license tax, are controlled by special act No. 73, of April 26, 1872, sec. 16, providing that no general provision shall apply to the city of New Orleans; *Held*, that a \$300 license tax exacted by that city was legal.

City of New Orleans vs. Globe Mut. Ins. Co., La. S. C., 5 Ins. Law Jour., 94.

2. The statute of New York, prescribing what shall be deemed the surplus of an insurance company for the purpose of making

dividends, makes the whole amount of premiums in force unearned, only in case of a dividend exceeding ten per cent. But such statute was framed for the special purpose of securing the policy holders, and has no relation to the question as to what shall be deemed property for the purpose of taxation. The latter is governed by the statutes relating to taxation, which are in no way affected by the act above. One-half of the premium receipts on unexpired risks, are properly earnings subject to taxation. Corporations may be assessed though no statement is made, and it was not error for the commissioners to affix a provisional valuation, which they subsequently reduced on receipt of the company's statement. They were not obligated to adopt the company's representations, nor to give the company a hearing concerning the valuation they adopted.

People vs. Barker, 48 N. Y., 70.

United States bonds, for purposes of exemption, were properly estimated at their par and not their market value.

National Bank vs. Commonwealth, 9 Wall., 353; 6 Penn. St., 70; 15 id., 351; 53 id., 219; 2 Ellis & Ellis, 548.

New York city bonds were not entitled to exemption. A State may tax its creditors within its jurisdiction.

Murray vs. Charlestown, 6 Otto, 432, distinguished.

People ex rel. Manhattan and Niagara Ins. Co. vs. Board of Commissioners, etc., N. Y. C. A., 8 Ins. Law Jour., 29.

3. It is not in contravention of the constitution of the United States, for a State to levy a tax upon the gross receipts from premiums of an insurance company, incorporated under her laws, though such premiums may have been received outside of the State, and for insurance on property in another State or in a foreign country. A corporation is not a citizen except for purposes of jurisdiction, within the meaning of the constitution.

Ins. Co. vs. Freuch, 18 How., 404; *Paul vs. Virginia*, 8 Wall., 178; *Ducat vs. Chicago*, 10 ib., 415; *Ins. Co. vs. Massachusetts*, ib., 573; *R. R. Co. vs. Karns*, 12 Wall., 81; *Bank vs. Earle*, 13 Pet., 519; *Ins. Co. vs. Morse*, 20 Wall., 456; *Doyle vs. Ins. Co.*, 4 Otto, 341. *Cases of Brown vs. Maryland*, 12 Wheat., 418; *Hays vs. S.S. Co.*, 17 How., 596; *S.S. Co. vs. Port Warden*, 6 Wall., 31; *Almy vs. California*, 24 How., 169; *Tonnage Tax cases*, 15 Wall., 232; *State Tax on Foreign Bond*, ib., 300; *Munn vs. Illinois*, 4 Otto, 135;

Doyle vs. Ins. Co., 4 Otto, 341; Passenger cases, 7 How., 283; Crandall vs. Nevada, 6 Wall., 36, distinguished.

The tax is on a receipt of money or its equivalent, not on property. A policy of insurance is not an instrument of commerce, but a mere contract of indemnity.

Gross Receipts case, 15 Wall., 294; Erie R. R. Co. vs. Pennsylvania, 21 ib., 497; Savings Society vs. Coite, 6 Wall., 606; Osborn vs. Bank, 9 Wheat., 859; Nathan vs. Louisiana, 8 How., 73; Provident Inst. vs. Massachusetts, 6 Wall., 594; Delaware Railroad Tax, 18 Wall., 206, 231; Munn vs. Illinois, 4 Otto, 114; McKean vs. Northampton Co., 13 Wr., 519; 15 Wall., 325.

Ins. Co. of North America vs. Commonwealth, Pa. S. C., 8 *Ins. Law Jour.*, 66.

4. A tax on gross premiums of foreign companies is on the business, and not an *ad valorem* tax on property, and is not in violation of the State Constitution of Nevada. The State may impose whatever terms it pleases as a condition for doing business.

Paul vs. Virginia, 8 Wall., 168; Ducat vs. City of Chicago, 10 Wall., 410; *Ex parte Robinson*, 12 Nev., 263.

Ex parte Cohn, Nev. S. C., 8 *Ins. Law Jour.*, 15.

5. A municipal corporation may impose a tax upon the business of foreign insurance companies. In order to be uniform as to the class upon which it operates, as required by the constitution, it is not necessary that the tax should operate alike on all insurance companies; foreign and domestic companies may be regarded as separate classes.

Ducat vs. Chicago, 118 Ill., 172.

Hughes vs. City of Cairo, Ill. S. C., 8 *Ins. Law Jour.*, 909.

6. Although an amount paid for doing business in a State by an insurance company, may be proportioned to the amount of business done, this fact does not render such amount a tax instead of a license fee. The Legislature has full power to require a license fee of a foreign insurance company, for the privilege of doing business in the State; and also to exact taxes from it in addition to the license. In construing statutes relating to this matter, whatever appears to be most in harmony with the general purpose of the statute is to be regarded as the meaning thereof.

Municipal corporations may be authorized to regulate the business of foreign insurance companies within their limits, and to license the agents thereof to transact such business on the payment of a fee in such manner as may be prescribed.

Citing and discussing *Ill. Mut. F. Ins. Co. vs. City of Peoria*, 29 Ill., 180; *East St. Louis vs. Wehrung*, 46 Ill., 372; *Ducat vs. City of Chicago*, 61 Ill., 172; *Van Iningen vs. Chicago*, 61 Ill., 31; *People vs. Thurbee*, 13 Ill., 554.

Walker vs. City of Springfield, Ill. S. C., 9 *Ins. Law Jour.*, 361.

7. The act of March 20, 1877 (P. L., 10), imposes a tax upon the gross premiums received by all insurance companies, incorporated in Pennsylvania, "except companies doing business upon the purely mutual plan, without any capital stock or accumulated reserve." The Lycoming Mutual Fire Insurance Company was originally incorporated as a purely mutual company. By a supplement to its charter, it was authorized, in its discretion, to make insurance for cash premiums, which should not entitle the insured to membership in the company, nor subject them to assessment. *Held*, that the Lycoming Insurance Company, by accepting and acting under the supplement, ceased to be a "company doing business upon the purely mutual plan," and was therefore liable to the tax imposed by the above mentioned act.

Susquehanna Ins. Co. vs. Perrine, 7 W. & S., 351; *Schimpf vs. Ins. Co.*, 5 Nor., 373.

Lycoming F. Ins. Co. vs. Commonwealth, Pa. S. C., 10 *Ins. Law Jour.*, 585.

8. The sixth section of the Pennsylvania act of March 24, 1877, taxes the gross receipts of a Pennsylvania corporation on business done out of as well as within the State, and there is nothing in the constitution of the State or of the United States to prevent such a tax; it is not a tax on inter-State commerce, and the State has full jurisdiction over the corporation, and can tax the money due it, wherever required.

Commonwealth of Pa. vs. Ins. Co. of N. A., Dauphin Co. (Pa.) C. P., 7 *Ins. Law Jour.*, 717.

WHAT IS NOT VALID OR LEGAL.

9. Authority in a city charter to license and tax insurance companies or their agents, to raise a fund with which to procure apparatus for extinguishing fires and constructing reservoirs, does not justify an ordinance levying a tax upon premiums earned by such companies in the city, to constitute a fund to be applied to the support of the fire department generally.

City of Alton vs. Etna Ins. Co., Ill. S. C., 82 Ill. R., 45.

10. *Held*, that a municipal ordinance authorizing a tax on premium receipts has no validity without warrant in the city charter, and cannot be offered in evidence without showing authority to pass such an ordinance. A section of the act claimed as authority for the ordinance, provided, "that the provisions of this section shall not be construed to prohibit cities having an organized fire department from levying a tax in accordance with the provisions of their respective charters, to be applied exclusively to the support of the fire department of such city." *Held*, that it was incumbent to show that the city had a fire department to justify the levy.

City of Alton vs. Hartford Fire Ins. Co., Ill. S. C., 4 Ins. Law Jour., 155.

11. The Tennessee act of March 24, 1875, prescribes that insurance companies not organized within the State, "shall pay into the treasury of this State the sum of \$2.50 upon each \$100 of said premiums so ascertained, which shall be in lieu of all other taxes." *Held*, that the city of Memphis has no right to assess a license tax upon foreign companies.

City of Memphis vs. Hernando Ins. Co., Tenn. S. C.

City of Memphis vs. Foreign Ins. Co., Tenn. S. C., 5 Ins. Law Jour., 175.

12. The Ga. Act of 1869 provided that when any other State should require of companies incorporated in Ga., and having agents therein, or of the agents any deposit or payment for taxes, penalties, etc., greater than the amounts required from similar companies of other States by Ga., then such companies of other

States shall be required to pay a like amount to the comptroller-general. *Held*, that the object of the act was to prescribe the terms upon which foreign companies might do business, not to assess a tax for the purpose of raising a revenue, and the comptroller-general had no power under that act to assess a tax on foreign companies under the general tax laws, from which he derives his power to assess taxes.

Home Ins. Co. et al. vs. Goldsmith, Atty. Gen., Ga. S. C., 8 Ins. Law Jour., 811.

13. The code of Alabama requires all insurance companies not incorporated under the laws of that State, to pay to the State a license tax of \$100, for the privilege of doing business in the State. The State of Mississippi requires all insurance companies not incorporated under the laws of that State, to pay to the State a license tax of \$1,000 to be in lieu of all other taxes or licenses. Counties and cities are prohibited from exacting any tax or license. The code of Alabama further requires that: "Whenever the existing or future laws of any State of the United States shall require of insurance companies, incorporated by or organized under the laws of the State, or of the agents thereof, any deposit of securities in such State for the protection of policy holders or otherwise, or any payment of taxes, fines, penalties, certificates of authorities, license fees or otherwise greater than the amount required for similar purposes from similar companies of other States, by the then existing laws of this State, then in every such case, all companies of such States establishing or having heretofore established an agency or agencies in this State, are required to make the same deposit for like purposes with the treasurer of this State, for taxes, fines, penalties, license fees, or otherwise, an amount equal to the amount of such charges and payments imposed by the laws of such State, upon the companies of this State, and the agents thereof." The City of Mobile by municipal ordinance required agents of insurance companies of other States to pay a license tax of \$10. In a suit against Clark and Murrell, agents for a Mississippi company at Mobile, by the City of Mobile to recover the license tax of \$10, they answered that they had paid the license tax of \$1,000 to the State of Ala-

bama under the above section, which was in full, and that the city could not make a further exaction. *Held*, that payment of the license tax of \$1,000 afforded no protection; the retaliatory law under which it was paid, is unconstitutional and void, being in conflict with provisions of the constitution requiring uniformity of taxation.

Mayor of Mobile vs. Stonewall Ins. Co., 53 Ala., 570; *Mayor, etc., vs. Dargan*, 45 Ala., 318; *City of Davenport vs. R. R. Co.*, 38 Iowa, 633.

Held, that this retaliatory law confides to a foreign jurisdiction that legislative discretion which the General Assembly of Alabama are constitutionally bound to exercise themselves, and which they cannot delegate or commit to another, and is therefore unconstitutional and void.

Thorne vs. Cramer, 15 Barb., 112; *State vs. Ware*, 33 Iowa, 34; *Barte vs. Himrod*, 8 N. Y., 483.

Clark & Murrell vs. Port of Mobile, Ala. S. C., 10 *Ins. Law Jour.*, 357.

See Cross Index for other cases bearing on TAXATION.

TENANT.

See LANDLORD AND TENANT.

THEFT.

See POLICY, LOSS, REMOVAL.

See Cross Index for cases bearing on THEFT.

TITLE.

ABSTRACT OF THE LAW.

a. Neither a legal nor an equitable title is necessary to sustain a valid contract of insurance; it is sufficient if the insured has a reasonable pecuniary interest in the subject of insurance.

Williams vs. Crescent Ins. Co., 15 La., 651; *Buck vs. Chesapeake Ins. Co.*, 1 Pet. (U. S.), 151; *Herkimer vs. Rice*, 27 N. Y., 163.

b. A mere legal title will not necessarily sustain a contract, in the absence of a valid interest.

Clay F. Ins. Co. vs. Huron etc. Salt Co., 31 Mich., 346.

c. A transfer of title which terminates all insurable interest, works a forfeiture whether so stipulated or not, but if any insurable interest remains, the contract is valid unless otherwise expressly stipulated.

Wilson vs. Hill, 3 Met. (Mass.), 66; *Shepherd vs. Union etc. Ins. Co.*, 3 N. H., 232; *Jackson vs. Aetna Ins. Co.*, 16 B. Mon., (Ky.), 242; *Campbell vs. Hamilton Ins. Co.*, 51 Me., 69; *Ayres vs. Home Ins. Co.*, 21 Iowa, 183; *Wheeling Ins. Co. vs. Morrison*, 11 Leigh (Va.), 334.

d. Any transfer or change of title, whether voluntary or otherwise, will work a forfeiture when so stipulated.

Davenport vs. N. E. Ins. Co., 6 Cush., 840; *Savage vs. Howard Ins. Co.*, 52 N. Y., 502.

e. Death of the insured may operate as a change of title, though not an alienation.

Lappin vs. Charter Oak Ins. Co., 58 Barb., (N. Y.), 323; *Burbank vs. Rockingham etc. Ins. Co.*, 24 N. H., 550.

f. Whether a mortgage is a change of title within the policy, the courts are not agreed, but the general doctrine is that it is not.

Hutchins vs. Cleveland Ins. Co., 11 Ohio St., 477; *Ketts vs. Massasoit Ins. Co.*, 56 Barb., (N. Y.), 177; *Shepherd vs. Union &c. Ins. Co.*, 38 N. H., 232; *McLaren vs. Hartford Ins. Co.*, 5 N. Y., 151.

g. A mere inchoate conveyance is not a change of title within the policy; the transfer must have been completed.

Washington Ins. Co. vs. Kelly, 32 Md., 421; *Clinton vs. Hope Ins. Co.*, 45 N. Y., 454; *Gilbert vs. N. A. Ins. Co.*, 23 Wend. (N. Y.), 43.

h. A mere transfer or change of title by the operation of law, which does not divest the insured of his interest, is not usually within the policy unless especially stipulated against.

Franklin Ins. Co. vs. Findlay, 6 Whart., 483; *Strong vs. Manufacturers' Ins. Co.*, 10 Pick. (Mass.), 40; *Phoenix Ins. Co. vs. Lawrence* 4 Met. (Ky.), 9.

i. Whether the transfer of a part works a forfeiture as to the whole, the courts are not agreed; the question depends upon the entirety or divisibility of the contract.

Friesmuth vs. Ins. Co., 10 Cush. (Mass.), 537; *Day vs. Charter Oak Ins. Co.*, 51 Me., 91; *Lee vs. Howard Ins. Co.*, 3 Gray, 583; *Stetson vs. Massachusetts etc. F. Ins. Co.*, 4 Mass., 330; *Commercial Ins. Co. vs. Spankneble*, 52 Ill., 53; *Manley vs. Ins. Co. of N. A.*, 1 Lans. (N.Y.), 20.

j. Whether transfer of title by one partner or joint owner to another, is within the policy, the courts are not agreed. Much depends upon the exact wording of the contract, which will usually be construed most strongly against the insurer.

Hoffman vs. Aetna Ins. Co., 32 N. Y., 405; *McMasters vs. Westchester Mutual Ins. Co.*, 29 Wend., 379; *Murdock & Garret vs. Ins. Co.*, 2 Comst., 210; *Wilson vs. Mutual Ins. Co.*, 16 Barb., 511; *Dix vs. Mercantile Ins. Co.*, 32 Ill., 272; *Barnes vs. Union Ins. Co.*, 51 Me., 110; *Pierce vs. Ins. Co.*, 50 N. H., 297; *Cowan vs. Ins. Co.*, 40 Iowa, 551.

k. A dissolution of partnership and division of the property has been held to be a change of title.

Keeney vs. Home Ins. Co., 3 T. & C. (N. Y.), 478.

l. In the absence of inquiry, it is not necessary to disclose the particular character of the title, but when called for, its character must be truly stated.

Tyler vs. Aetna Ins. Co., 12 Wend., 507; *Franklin Fire Ins. Co. vs. Coates*, 14 Md., 285; *Curry vs. Insurance Co.*, 10 Pick., 535; *Morrison vs. Ins. Co.*, 18 Mo., 262; *City Fire Ins. Co. vs. Mark*, 45 Ill., 482; *Protection Ins. Co. vs. Harmer*, 2 Ohio St., 452; *Birmingham vs. Empire Ins. Co.*, 42 Barb., 457; *Jenkins vs. Quincy Mut. Ins. Co.*, 7 Gray, 470; *Leathers vs. Farmers' Mut. Ins. Co.*, 4 Fost., 259.

m. If the particular statement as to title be a part of the contract, it thereby becomes material, if not, it is a representation which will only work a forfeiture when material *per se*.

Loehner vs. Home Mut. Ins. Co., 17 Mo., 247; *Day vs. Charter Oak Ins. Co.*, 51 Me., 91; *Patten vs. Ins. Co.*, 38 N. H., 338; *Mutual Ins. Co. vs. Deale*, 18 Mo., 26.

See further on this subject under AGENT, ALIENATION, INCUMBRANCE, INSURABLE INTEREST, MORTGAGE, MORTGAGOR AND MORTGAGEE, REPRESENTATION, WAIVER, WARRANTY.

DIGEST OF RECENT CASES.

TITLE—WHAT IS A MISREPRESENTATION THAT WILL WORK A FORFEITURE.

1. Statement in the application that the title was that of fee simple, and unincumbered, while it was in fact a leasehold incumbered by a claim for \$200, avoids the policy unless insured is relieved from the consequences for sufficient reasons. Where insured building stands on leased land, *Held*, that absolute owner-

ship of the building is as great an interest in the subject of insurance as is expressed by "fee simple."

Planters' Ins. Co. vs. Sorrells, Tenn. S. C., 4 Ins. Law Jour., 195.

2. The possession of a bare legal title by the insured, while the equitable estate and interest, and the right to be immediately invested with the legal title, belonged to another, is not sole and unconditioned ownership, and where the policy provided that it shall be void if the insured be not such owner, the insurance is void.

Columbian Ins. Co. vs. Lawrence, 2 Pet., 25; Hough vs. City Fire Ins. Co., 29 Ct., 10.

The rejection of an offer to prove such equitable title on the part of the company, is erroneous.

Clay Fire and Mar. Ins. Co. vs. Huron Salt and Lumber Mfg. Co., 31 Mich., 346; 4 Ins. Law Jour., 858.

3. Title of M. to property devised to the husband of M., in trust for M. and her children by him, and in case she should die without such children, then in trust for the rest of his children and their representatives at the time of such death, is not absolute, and if so represented, avoids the policy.

Murphrey & Co. vs. Old Dominion Ins. Co., U. S. S. C., 5 Ins. Law Jour., 297.

4. The insurance was in the name of P., and described the property as "his." The policy provided that "if the interest on the property insured be leasehold, or that of mortgage, or any other interest not absolute," it must be expressed in the policy. The property was purchased under a mechanic's lien sale by V., who placed it in the name of P., and procured the insurance as the agent of P. V. subsequently procured another title through a sheriff's deed in an execution sale. The mechanic's lien proceedings were void for want of jurisdiction. *Held*, that P. had at best only a bare possession; he had neither a legal nor equitable ownership to the extent represented in the policy, and could not recover.

Porter vs. Aetna Ins. Co., U. S. C. C. Mich., 6 Ins. Law Jour., 928.

5. A part of the insured property was purchased on credit, and by the contract the title was not to pass until the price was fully paid. A part only of this price had been paid. The policy provided that if any other person had an interest in the property, a failure to state the fact, and any misrepresentation or concealment, should render it void. *Held*, that an insurance upon the property simply as owner, for an amount in excess of the insured's interest, avoided this part of the insurance.

Kibbe vs. Hamilton Fire Ins. Co., 11 Gray, 153; *Clay F. & M. Ins. Co. vs. Huron S. & L. Co.*, 31 Mich., 346.

A part of the property covered belonged to the wife of insured. *Held*, that in Michigan the husband has no control over his wife's property, and the insurance was void for want of interest. *Held*, that the case was not affected by the agent's knowledge of the fact. No agreement between the parties could legalize a wager policy.

Peoria F. & M. Ins. Co. vs. Hall, 13 Mich., 202.

Agricultural Ins. Co. vs. Montague, Mich., S. C., 38 Mich., 548; 7 *Ins. Law Jour.*, 708.

6. The application was a warranty. The insured stated that there was no incumbrance, and that his title was absolute, whereas the property was incumbered by a mortgage, and he had only a life interest. *Held*, that there was material misrepresentation, which avoided the policy.

Ætna Ins. Co. vs. Resh, Mich., S. C., 40 Mich., 241; 8 *Ins. Law Jour.*, 271.

7. A policy of insurance upon a building, situated upon leased land, provided that "such insurance should be void if the interest of the assured be any other than the entire, unconditional, free, and unencumbered ownership of the property, and is not so expressed in the written portion of the policy." Prior to issuing the policy, an undivided half interest, subject to a mortgage to the wife of assured, was vested in an assignee for the benefit of creditors of a former owner, who, when called upon by assured to get such interest, told assured that "it was not worth his while to go on" with the assignment. Assured's wife then told him he could have her interest. No papers were exe-

cuted, and no consideration paid or released. *Held*, that neither the interest of the assignee nor wife had passed, and assured was not the absolute owner and under the clause above quoted the policy was void.

Miller vs. Amazon Ins. Co., Mich. S. C., 10 Ins. Law Jour., 581.

8. Where it was a part and condition of a policy of fire insurance, that the insured should state in the application the nature of his title, if less than an absolute and unconditional fee simple, and that a failure to do so should avoid the policy: *Held*, that the condition was part of the contract and must be complied with. *Held*, that the insured, who was in possession of the premises under a verbal gift from a near relative, was within the condition and could not recover, notwithstanding the fact that he had made valuable improvements and repairs, had paid taxes, and the verbal gift was accompanied with the promise to make a deed of conveyance when requested, which deed, after the loss had occurred, was duly made and delivered.

Pierce vs. Ins. Co., 62 Barb., 645; Birmingham vs. Ins. Co., 42 ib., 459; Reynolds vs. Ins. Co., 2 Gran., 329; Leathers vs. Ins. Co., 4 Frost (N. H.), 261.

Wineland vs. Security Ins. Co., Md. C. A., 9 Ins. Law Jour., 551.

9. When a policy includes real property and also personal property situate therein, the risk being distributed, a misrepresentation as to the reality, avoiding the insurance thereon, avoids the whole policy, the contract being entire. Where a policy, covering specific kinds of personal property in a building, provides that it shall be avoided by any subsequent change of title of such property, and property of the kinds described is subsequently mortgaged and placed with other property of like character, in the building, and the assured claims payment for the loss of such mortgaged property, the subsequent mortgage avoids the policy. The fact that the personal property for which a recovery is claimed, is so covered by mortgages that it is difficult to ascertain the interest of the assured therein, is an additional reason for giving full effect to the clause providing for a forfeiture.

Hinman vs. Ins. Co., Wis. S. C., 48 Wis., 36.

WHAT IS A CHANGE OR TRANSFER.

10. The policy provided that it should be void in case the property should become incumbered, or of foreclosure proceedings, or of any neglect to furnish proofs of loss and notice on the part of the insured as required, or in case of assignment without consent indorsed. Agents might give such consent but no other, nor could they waive any conditions of the policy. The policy was payable to mortgagee. Afterwards mortgagor sold her equity, accepting notes secured by deed of trust from purchaser. Consent to the assignment of policy to purchaser was indorsed by the agent, but no notice of deed of trust was given to the company or mentioned in the policy. *Held*, that the indorsement of consent to assignment was not necessarily notice of a transfer of title; it did not appear that the purchaser had paid any cash or had any valuable interest in the property above the amount of the original mortgage, and in the absence of any notice to the company of the change of title, the policy was void.

German National Bank vs. Agricultural Ins. Co., St. Louis (Mo.) C. A., 9 Ins. Law Jour., 554.

WHAT IS NOT A MISREPRESENTATION AND WILL NOT FORFEIT.

11. The policy insured plaintiff "on his two buildings." *Held*, that the phrase was merely descriptive, not a warranty of ownership.

Niblo vs. Ins. Co., S. C. R., 531; Traders' Ins. Co. vs. Roberts, 9 Wend., 404; Tyler vs. Aetna Ins. Co., 12 Wend., 507.

Rohrbach vs. Germania Fire Ins. Co., N. Y. C. A., 62 N. Y., 47; 4 Ins. Law Jour., 737.

12. P. was owner of a saw-mill. T. had possession. A contract was executed by which P. agreed to sell on certain terms to T., and the latter agreed that the machinery should be part of the freehold, but did not agree to buy. T. bought the machinery and gave a chattel mortgage on it to B. B. bought out the entire interest of T. at a receiver's sale. There was conflicting evidence about the actual delivery of the contract. It was also claimed that the contract was void for want of consideration. B. effected

insurance on the machinery as his own, contained in the mill held by him under contract of sale from P. *Held*, that sufficient consideration was expressed in the contract, and the question of its delivery was proper for the jury. Even if invalid it did not necessarily affect B.'s title. *Held*, that B. was so far the owner of the chattels insured as to have an insurable interest, properly expressed in the policy. *Held*, that evidence to prove B. bought the property for T. was properly excluded. The representation of B. that he held the property under contract from P. was true.

Bicknell vs. Lancaster City and County Fire Ins. Co., N. Y. Com. A., 58 N. Y., 677; 4 Ins. Law Jour., 441.

13. A vendee in possession under an executory contract of purchase, is an "unconditional and sole owner of the property," within the terms of a policy of insurance. An application for insurance by such vendee, without a specific statement of the nature of his interest, is not "an omission to make known every fact material to the risk," within the terms of the policy, where such policy was made payable to the vendee as his interest may appear.

Rumsey vs. Phoenix Ins. Co., U. S. Circuit Court, N. D. N. Y.

14. The insured had purchased the property paying half down, and was to receive a deed upon payment of the balance; *Held*, that he was the equitable owner, and his insurable interest was not necessarily limited to the purchase money.

Millville Ins. Co. vs. Wilgus, Pa. S. C.

15. In an application for a policy of fire insurance were these questions and answers. "What is your title to the property? Contract." "How much insured in other companies? None." In an action upon the policy; *Held*, that the fair interpretation of the questions and answers was that plaintiff held the property by a contract for the purchase thereof, and had himself no other insurance, and that the fact that plaintiff's vendor had an insurance upon his interest did not constitute a breach of warranty.

Sprague vs. Holland Purchase Ins. Co., N. Y. C. A., 69 N. Y., 128.

16. The policy provided that any interest not absolute or less than a perfect title, must be specifically represented to the company and expressed in the policy, or it should be void. *Held*, that the words referred to the quantity of the interest as measured by its duration, and where the title was fee simple, a mere incumbrance in the shape of a lien for unpaid purchase money not disclosed to the agent, was no violation of the provision in the absence of fraud or special inquiry.

Hough vs. City F. Ins. Co., 29 Conn. R., 10; *West Rockingham Mut. F. Ins. Co. vs. Sheets & Co.*, 26 Gratt., 854.

Wooddy vs. Old Dominion F. Ins. Co., Va. S. C. A., 9 Ins. Law Jour., 276.

17. The application showed that the plaintiffs were the sole owners of the buildings and machinery, but the defendants claimed that the plaintiffs had no insurable interest other than that of tenants. The only adverse title was a void tax title. *Held*, that the insured were not bound to disclose the existence of a void tax title to the premises. The property had been taken possession of by the military authorities, who held it until the plaintiffs commenced proceedings to regain possession of it. Under a decree of the United States Court a receiver was appointed, who rented the premises to the plaintiffs. *Held*, that these facts do not contravene the statement that no other one was interested in the property. Policy was intended to mean that no third person had any claim upon the property, and that the plaintiffs, though renters, were owners of the property.

Cheek et al. vs. Columbia Ins. Co. et al., Tenn. S. C., 4 Ins. Law Jour., 99.

18. It does not follow in Virginia, that because the wife of a former owner of the property insured had a contingent right of dower at the time of its transfer by reason of her failing to join in the transfer, therefore she must have continued to have it at the time a policy was subsequently issued to the purchaser, and a refusal to so instruct was not error. A contingent right of dower is not such an interest as invests insured in less than a perfect title or such an incumbrance as is required to be disclosed in the application for a policy.

Hough vs. City F. Ins. Co., 29 Conn. R., 10; Southern Mut. Ins. Co. vs. Klæber, 9 Ins. Law Jour., 30.

Where the policy provides that misrepresentation or concealment will avoid it when the hazard is increased thereby, and if reference is made to an application, survey, plan or description, these shall be considered a part of the contract and a warranty: *Held*, that the mere failure to disclose the existence of a contingent right of dower, would not defeat the policy in the absence of fraud or an increase of risk. *Held*, that an increase of premium by the insurers would not be an increase of risk.

Va. F. & M. Ins. Co. vs. Klæber, Va. S. C., 9 Ins. Law Jour., 354.

19. Mortgage incumbrances not represented and expressed, do not avoid the policy under a provision that "if the interest of the insured in the property be any other than the entire and unconditional ownership of the property for the use and benefit of the insured," it must be so represented and expressed, otherwise the policy shall be void. If disclosure of incumbrance is deemed essential it must be so expressed in plain terms.

Kelly's case, 32 Md. Rep., 421; Bowman vs. Ins. Co., 40 Md., 630 (3 Ins. L. J., 395).

Clay F. & M. Ins. Co. vs. Beck & Bolte, Md. C. A., 5 Ins. Law Jour., 289.

20. The constitution of a mutual company in Va. prohibited those who had taken the benefit of the homestead law from becoming members. The insurance was in the name of a firm, one of whose members as an individual had taken the benefit of the law. Nothing was said in the policy about the law. *Held*, that even if both partners had taken the benefit of the law as individuals, this would not be taking the benefit of the law as a partnership. *Held*, that all the liabilities of the firm, including those to the company, must be discharged before the individual creditors could appropriate the partnership property to their benefit, and even if the constitution could be deemed a part of the policy, this did not avoid the policy. The language of the policy is the language of the company, and must be taken in the sense most favorable to the insured. In the case of a

mutual company having no lien on the property insured under its policy, a failure to give notice of a vendor's lien on the property, where nothing in the policy calls for such a disclosure, and no question was propounded by the insurer regarding it, does not in the absence of fraud avoid the policy.

Tyler vs. Ætna Ins. Co., 12 Wend. R., 507; *Case of Delahy vs. Memphis Ins. Co.*, 2 Bennett's F. Cas., 665, and cases cited in note; 3 ib., p. 527; *Morrison's Admrs. vs. Tenn. M. and F. Ins. Co.*, 18 Mo. R., 262; *Columbian Ins. Co. vs. Lawrence*, 2 Pet. R., 25; *May on Ins.*, sec. 563, and cases cited; *Shirley vs. Mut. Ass. Soc.*, 2 Rob. Rep. (Va.,) 705.

West Rockingham Mut. Fire Ins. Co. vs. Sheets & Co., Va. S. C. A., 7 *Ins. Law Jour.*, 782.

21. The goods had been purchased by V., the insured, of F., and left in the store of H., an auctioneer, for sale. V. agreed that the first proceeds of the sale should be paid to F., to the amount of \$3,150, and if H. advanced any money upon the stock, he was authorized to retain possession of the goods as security. There was no evidence that any advance had been made. *Held*, that the interest of the insured in the property was absolute.

Franklin Fire Ins. Co. vs. Vaughan, U. S. S. C., 5 *Ins. Law Jour.*, 782.

22. A., the original owner of the property in New Hampshire, mortgaged it to S., and afterward conveyed the equity to P., holder of second mortgage. P. effected an insurance payable to S., and afterward made an agreement of sale for all his interest to T., the plaintiff, who made payment, entered on possession, and effected this insurance in another company. The policy provided that a failure to express the title therein, if other than the sole and unconditioned ownership, would avoid the contract; also that the insured should be entitled to recover no greater proportion of the loss than the amount insured bore to the whole sum insured. *Held*, that T. had an insurable interest as equitable owner, and under the N. H. Gen. Statutes, ch. 157, a failure to disclose the facts regarding the title, unless fraudulent, did not forfeit the policy. *Held*, that the insurance effected by P. was on a separate interest, and could not be held to contribute with the insurance effected by T. The apportionment

of the loss must be confined to the two policies, taking as a basis not the value of the property, but of plaintiff's interest as owner of the equity of redemption.

Tuck vs. Hartford Fire Ins. Co., N. H. S. C., 56 N. H., 326; 5 Ins. Law Jour., 497.

23. The house was spoken of as "my residence" in the application, but there was no representation as to title, and there was no policy condition which related to the matter of title. *Held*, that it was allowable for plaintiff to show by parol the existence of dealings between himself and partner which constituted him beneficially and equitably, if not strictly in law, sole owner. Parties applying for insurance are not called to settle questions of title with great accuracy. In such cases the silence of the insured as to the precise condition of title, is not a ground for complaint by the company. Only the amount of recovery, not the right, is affected by the question of ownership.

Liverpool, London and Globe Ins. Co. vs. McGuire, Miss. S. C., 52 Miss., 227; 5 Ins. Law Jour., 851.

24. The policy provided that if the interest of the assured were "other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured," it must be so represented and expressed in the policy, otherwise it should be void. By a contract with the insured, one W. was to have a fourth of the profits from the sale of the insured property, the condition being that W. should sign insured's note for \$1,000 to be put into the business, which note was to be taken care of by the insured, and also that W. should give his time or furnish a man to sell the property. *Held*, that the insured's ownership was for his own use and benefit, and not for that of W., within the meaning of the policy.

Boutelle vs. Westchester Fire Ins. Co., Vt. S. C., 51 Vt., 4; 7 Ins. Law Jour., 781.

25. It was claimed that the insured had entered on the land of another as trespasser, and erected the building insured. *Held*, that if he entered as trespasser, he had no insurable interest, but want of title is no defense in an action on a policy of fire insurance, if the insured entered upon his land and took his insurance

in good faith, under a reasonable and honest belief that he had title, and if he did not withhold the knowledge of a dispute about his title in bad faith.

Monroe Co. Mut. Ins. Co. vs. Robinson, Pa. S. C., 7 Ins. Law Jour., 636.

26. The furniture insured was acquired by bill of sale absolute in form, but intended only as security for money lent. G. lived in a house belonging to insured, who, after going to the house and receiving formal possession, allowed it to remain in the custody of G., with the understanding that the legal title was to be in the insured. The bill of sale was an indorsement on a bill of parcels from a prior owner by G. in the following words: "I hereby transfer and sell all the above furniture to," etc. *Held*, that the transaction was not in the nature of a pledge or mortgage, it was a transfer of the legal title to the insured, which not having been defeated by creditors, entailed on him a direct loss to the value of the property insured.

Haley vs. Manufacturers' Ins. Co., 120 Mass., 296; Eastern Railroad vs. Relief Ins. Co., 98 Mass., 423; Williams vs. Roger Williams Ins. Co., 107 Mass., 379; Clark vs. Washington Ins. Co., 100 Mass., 510; Pennock vs. McCormick, 120 Mass.

Held, that the property was properly described as the plaintiff's household furniture. The omission to state that the property was in the custody of another, in the absence of inquiry, was not a material concealment or misrepresentation. Statements in the proofs of loss that "the property belonged exclusively to the assured, and that no other person had any interest therein," and that "the articles named belonged to and were in the possession of the insured at the time of the fire," were not fraud or false swearing within the terms of the policy.

Campbell vs. Charter Oak Ins. Co., 10 Allen, 213; Daniels vs. Hudson River Ins. Co., 12 Cush., 416; Curry vs. Commonwealth Ins. Co., 10 Pick., 535.

Little vs. Phœnix Ins. Co., Mass. S. J. C., 123 Mass., 380; 7 Ins. Law Jour., 471.

27. The policy provided that "if the interest of the insured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the insured,

or if the buildings insured stand on leased ground, it must be so represented to the company and be so expressed in the written part of the policy, otherwise the policy shall be void." The fee simple to the land was in the insured, and they were the owners of the buildings insured, subject to a lease at a certain annual rental for ten years, given before the buildings were erected, and having about eight years to run. The conditions were that the lessee was to erect the buildings and the lessor was to pay half the cost in installments during the progress of the work. The lessee was also to keep the buildings insured during the time employed in the erection, in the name and for the benefit of the lessor. *Held*, that the interest of the builder was not different from that of an ordinary lessee. The entire and unconditional ownership of the buildings, as well as the land, was in the lessor insured, and the policy was not avoided by a failure to mention the lease. Such a lease is a mere chattel interest, and passes only a transient interest in land.

Cases of *Gahagan vs. Ins. Co.*, 43 N. H., 177; *Warner vs. Ins. Co.*, 21 Conn., 444; *Towne vs. Ins. Co.*, 7 Allen, 51; *Ins. Co. vs. Wright*, 22 Ill., 474; *Smith vs. Ins. Co.*, 6 Cush., 448; *Brown vs. Williams*, 28 Me., 262; *Hinman vs. Ins. Co.*, 36 Wisc., 167; *Smith vs. Ins. Co.*, 17 Penn. St., 253; *Ins. Co. vs. Lawrence*, 10 Pet., 516; *Ins. Co. vs. Brennan*, 58 Ill., 158, distinguished; *Mayor vs. Ins. Co.*, 10 Bosw., 545; *May vs. Ins. Co.*, 9 id.; *Ins. Co. vs. Kelly*, 32 Md., 438; *Hubbard vs. Ins. Co.*, 33 Iowa, 333; *Ex parte Gay*, 5 Mass., 419; *Brewster vs. Hill*, 1 N. H., 351; *Bisbee vs. Hall*, 3 Ohio, 463; *Dillingham vs. Jenkins*, 7 S. & M., 487; *Spangler vs. Stanler*, 1 Md. Ch. Decis., 36; *Moshier vs. Reding*, 12 Me., 492; *Maverick vs. Lewis*, 3 McCord, 216; *Carwell vs. Dietrich*, 15 Wend., 379; *Chapman vs. Black*, 5 Scott, 553; *Waller vs. Morgan*, 18 B. Mon., 141; *Watterton vs. Hakewell*, 3 Man. & Gr., 297; *Atkinson vs. Humphrey*, 2 C. B., 654; *Ins. Co. vs. Kelly*, 32 Md., 438.

Lycoming F. Ins. Co. vs. Haven, U. S. S. C., 95 U. S., 242; 7 *Ins. Law Jour.*, 449.

28. The lessees for a term of years, under the provisions of their lease removed a building thereon and erected a new one, which was to be delivered up to the lessors at the end of the term. They effected insurance, describing it as "their two story brick and graveled roof building, occupied by them," "situated on leased land." The policy provided that, "the interest of the insured, whether as owner, consignee, factor, lessee or otherwise, in the property to be insured, shall be truly stated in the policy,

otherwise the same shall be void; and such interest shall also be set forth in the proofs of loss, with the names of the true owners of the property;" and also that they should set forth under oath in the proofs among other things, "what was their interest therein;" and if there should appear any fraud or false swearing, the policy should be void. In the proofs of loss they stated under oath that the building belonged to them, and that no other person or party had any interest therein. *Held*, that the words "his" or "their," as descriptive of the property, do not, in the absence of specific inquiry, avoid the policy because the interest is qualified. *Held*, that the description of the building in the policy was sufficiently accurate. The provision, being for the benefit of the insurers, must be strictly construed. It calls for character of the interest and not for a detailed statement of its extent.

Fletcher vs. Commonwealth Ins. Co., 18 Pick., 419; *Strong vs. Manfrs' Ins. Co.*, 10 Pick., 40; *Curry vs. Commonwealth Ins. Co.*, 10 Pick., 535; *King vs. State Ins. Co.*, 7 Cush., 1; *Hough vs. City Ins. Co.*, 29 Conn., 10; *Clapp vs. Union Ins. Co.*, 7 Foster, 143; *Swift vs. Vermont Ins. Co.*, 18 Vt., 305; *Tyler vs. Aetna Ins. Co.*, 12 Wend., 507; *Niblo vs. North Am. Ins. Co.*, 1 Sandf., 551; *Irving vs. Excelsior Ins. Co.*, 1 Bosw., 507; *Williams vs. Roger Williams Ins. Co.*, 107 Mass., 377; *Hope Ins. Co. vs. Brolaskey*, 35 Penn. St., 282.

Held, that the statement in the proofs of loss was sufficiently accurate when taken with the subject matter as described in the policy. If not sufficiently satisfactory, further information should have been sought.

A dissenting opinion by the minority of the court, held that the statement of plaintiff's interest was not sufficient compliance with the requirements of the policy, citing:

Milton vs. Colby, 5 Met., 78; *Hutchins vs. Shaw*, 6 Cush., 58; *Howard vs. Fessenden*, 14 Allen, 124; *Draper vs. Charter Oak Ins. Co.*, 2 Allen, 569; *Strong vs. Manfrs' Ins. Co.*, 10 Pick., 40; *Curry vs. Commonwealth Ins. Co.*, 10 Pick., 535; *Williams vs. Roger Williams Ins. Co.*, *supra*; *Hough vs. City Ins. Co.*, *supra*; *Hope Ins. Co. vs. Brolaskey*, *supra*.

Fowle et al. vs. Springfield F. & M. Ins. Co., *Mass. S. J. C.*, 122 *Mass.*, 191; 7 *Ins. Law Jour.*, 188.

29. Where one mortgages chattels and insures the same, the loss to be paid to the mortgagees, and is afterward adjudicated a bankrupt on his petition, and under an order of the U. S. court he assigns all his property to a trustee, such assign-

ment does not avoid the policy where it contains a clause that "if any change takes place in the title or possession, whether by legal process or judicial decree, said policy shall be void." It is the settled law of Wisconsin that the mortgagee of chattels has the legal title to the property mortgaged even before the debt is due, and he may take immediate possession of the property unless by express stipulations the mortgagor is permitted to retain possession.

Bragg vs. New England Mut. Life Ins. Co., 25 N. H., 289. Cases distinguished of *Adams vs. Rockingham M. F. Ins. Co.*, 29 Me., 292; *Young vs. Eagle F. Ins. Co.*, 14 Gray, 150; *Hazard vs. Franklin M. F. Ins. Co.*, 7 R. I., 429; *Perry vs. Lorillard F. Ins. Co.*, 61 N. Y., 214.

Appleton Iron Co. vs. British Am. Ins. Co., Wis. S. C., 46 Wis., 23; 8 *Ins. Law Jour.*, 177.

30. The insured had purchased the property, paying half the purchase money down, the balance to be paid in the following year, when he was to receive a deed. The property was burned in the interval. *Held*, that though his title was an equitable one, it vested in him the entire, unconditional and sole ownership, subject to the payment of the balance, which was an incumbrance, and he had a right to so represent it. *Held*, that the insurance of an equitable owner is not necessarily limited to the purchase money paid.

Reynolds vs. State Mut. Ins. Co., 2 Grant's Cases, 326.

Milville Ins. Co. vs. Wilgus, Pa. S. C., 88 Pa., 107; 8 *Ins. Law Jour.*, 268.

31. The policy stipulated that if the interest of the insured was other than the entire and unconditional ownership, it must be so represented, or the policy should be void. The insured held under a contract of purchase from the plaintiff, on condition that he should erect a building worth \$1,000, keep the premises insured, assigning the policy to plaintiff, and make certain stipulated payments, and in the event of failure the plaintiff might declare the contract forfeited. The building had been erected, part of the first payment had been made, and the premises were in possession of insured, and plaintiff had not insisted on the forfeiture, but had recognized the rights of insured. There was no written ap-

plication, but insured had stated in reply to inquiries by the agent, that he owned it, that there was no mortgage, but that he owed a small amount for material and labor. The policy described the property as "his." *Held*, that the insured was in equity the owner, and as a question of law there was no misrepresentation as to title.

Moore vs. Burrows, 34 Barb., 173; *Hathaway vs. Payne*, 34 N. Y., 103; *Cogswell vs. Cogswell*, 2 Edw. Ch. Reports, 238; *Paine vs. Miller*, 6 Vesey Jr., 349; *Shotwell vs. Jefferson Ins. Co.*, 5 Bosw., 247, 257; *Acer vs. Merchants' Ins. Co.*, 57 Barb., 68; *Chase vs. Hamilton Mutual Ins. Co.*, 22 Barb., 527; *Tyler vs. Ætna Fire Ins. Co.*, 12 Wend., 513.

Held, that where it appeared from the evidence, and an indorsement on the policy, that the defendant's agent had knowledge of the real nature of the ownership, knowledge of the agent was knowledge of the company, and the latter could not assert ignorance on technical grounds for the purpose of defeating the contract.

McCulloch vs. Norwood, 58 N. Y., 562; *Van Schaick vs. Niagara F. Ins. Co.*, 68 N. Y., 434.

Pelton vs. Westchester F. Ins. Co., N. Y. C. A., 77 N. Y., 605; 8 *Ins. Law Jour.*, 492.

32. If a bill of sale of personalty be made to secure the vendee for a loan of money, the possession to remain in the vendor, and the property be afterwards insured in the name of the vendor, the policy is not void under a condition that if the interest of the assured be other than the entire, unconditional and sole ownership, it must be so expressed in the policy, otherwise the policy is to be void. Such a transfer was a mere security in the nature of a chattel mortgage, and the vendee had, at most, but a special or qualified right of property in the effects.

Hill vs. Cumberland Valley Mut. Prot. Co., 9 P. F. Smith, 474; *Ins. Co. vs. Wilgus*, 7 W. N., 24.

Kronk vs. Birmingham F. Ins. Co., Pa. S. C., 91 Pa., 300; 9 *Ins. Law Jour.*, 26.

33. The action was on a policy issued to plaintiff on "his frame dwelling house." At the trial it appeared that the plaintiff was the owner in fee of the land upon which the insured building stood August 5, 1876; that on that day he conveyed

the land by a warranty deed to one C.; that on Sept. 7, 1876, the defendant issued said policy; that on Nov. 25, 1876, C. reconveyed said land to the plaintiff by a warranty deed, and on the same day the plaintiff conveyed said land to N. by a warranty deed, N. at the same time, and as part of the same transaction, giving back to plaintiff a writing signed and sealed, stating that the conveyance was made simply to secure him from any liability for recognizing as a surety for the appearance of R. in a criminal suit, and that the land was to be reconveyed to W. upon N. being held harmless; that the conveyance to C. was for a similar purpose, and that a similar writing had been given by C. to plaintiff; that R. appeared in the criminal suit, and the land was reconveyed to plaintiff. In the proofs of loss upon a printed form, plaintiff swore that "the property belongs exclusively to me, and no one else has any interest therein." *Held*, that the plaintiff had an insurable interest at the time the policy was issued, which continued till its destruction.

Williams vs. Roger Williams Ins. Co., 107 Mass., 337.

Held, that in the absence of any specific inquiry by the insurer or any special stipulation in the policy, the interest of the plaintiff as equitable owner, was sufficiently described in the policy by the words "his dwelling house."

Strong vs. Manufacturers' Ins. Co., 10 Pick., 40; *Fowle vs. Springfield Ins. Co.*, 122 Mass., 191; *Little vs. Phoenix Ins. Co.*, 123 Mass., 380. *Case of Foote vs. Hartford Ins. Co.*, 119 Mass., 259, distinguished.

Walsh vs. Fire Association, Mass. S. J. C., 127 Mass., 383; 9 *Ins. Law Jour.*, 251.

34. If the application for a policy is made a part of the policy, and is a warranty, and covers the applicant's interest in, and title to the property, and his answer to the question, "What is your interest in the title to the property to be insured?" is "Fee simple;" *Held*, the fact that the wife of a former owner of the property, who is still alive, has a contingent right of dower in it, does not affect the applicant's interest in, or title to the property. Nor is it such an incumbrance as not being mentioned in his answer will be a breach of the warranty.

Wilson vs. Davidson, 2 Rob. R., 405; 4 Munf., 382; 4 Seld. (N. Y.), 110; 44 Missouri, 512, 515.

If in such case the application is not a warranty, the failure to mention the existence of such a contingent right of dower, is not such a misrepresentation as will avoid the policy. Where the case is submitted to the court, and the evidence as to the value of the property insured is conflicting, the appellate court cannot interfere with the judgment of the court below on the ground that the judgment is excessive.

Southern Mut. Ins. Co. vs. Frear, 29 Gratt., 261.

Southern Mut. Ins. Co. vs. Kloeber, Va. S. C. A., 9 Ins. Law Jour., 30.

35. Where the wife owns the building, and is with consent of her husband regarded as owner of the personalty within, a statement by her that she owns both in an insurance on building and furniture is not material to the risk.

Continental Ins. Co. vs. Ware, Ky. C. A., 9 Ins. Law Jour., 519.

36. If the assured was the absolute owner of the property (a dwelling house) destroyed, a dry trust of the legal title in another would not prevent a recovery.

Watertown Fire Ins. Co. vs. Simons, Pa. S. C., 9 Ins. Law Jour., 597.

37. Real and personal property was conveyed by the owner to a fictitious person, and then again by him in the fictitious name to plaintiff, who insured it as her own. *Held*, that while the conveyance to the fictitious name was void, the subsequent conveyance in the name of the latter was valid. A conveyance is valid against the conveyancer whatever name he may assume.

George vs. Surrey, 1 Moody & Malk, 516; *Baker vs. Dening*, 8 Ad. & El., 94; *Brown vs. Butchers and Drovers' Bank*, 6 Hill, 443; *Grafton Bank vs. Flanders*, 4 N. H., 239; *Palmer vs. Stephens*, 1 Den., 471; *Petition of John Snook*, 2 Hilton, 566.

Held, that the conveyance of personal estate would be valid irrespective of the method employed, through mere delivery. *Held*, that in the absence of any evidence of intended fraud against the company, the insurance was valid.

David vs. Williamsburgh City Fire Ins. Co., N. Y. C. A., 10 Ins. Law Jour., 150.

38. *Held*, that the entire, unconditional and sole ownership was in the insured, he having a perfect legal title, and was not affected by incumbrances which were not disclosed. *Held*, that an agreement to reconvey the title upon payment of certain indebtedness, did not affect such ownership.

Manhattan Ins. Co. vs. Baker, 7 Heiskell, 503; *Boutelle vs. Westchester Fire Insurance Co.*, 51 Vt., 4.

Carrigan vs. Lycoming Fire Ins. Co., *Vt. S. C.*, 10 *Ins. Law Jour.*, 606.

39. The policy was issued to two parties as joint owners. *Held*, that in the absence of specific inquiry, making the precise nature of the title material, the policy was not avoided by the insured property being held in severalty. It is not necessary that the precise nature of the interest should appear in the application, unless specifically required.

Rogers vs. Traders' Insurance Co., 9 Paige, 533; *DeForrest vs. Fullers' Fire Ins. Co.*, 1 Hall (N. Y.), 84; *Foster vs. U. S. Ins. Co.*, 11 Pick., 85.

Castner vs. Farmers' Mut. Ins. Co., *Mich. S. C.*, 10 *Ins. Law Jour.*, 458.

40. The policy provided that, "any other than exclusive ownership, shall render this policy void," and, "that if the interest of the assured in the property is not truly stated, the policy shall be void." The policy insured the National Slipper Company. The company was not a corporation but one individual doing business under that name, and whose assignee brought this suit. *Held*, that the company was not prejudiced by its ignorance of the fact. *Held*, that an individual, in the absence of fraud, is entitled to do business under such a title as he may elect, and an insurance under such title, is an insurance of the individual.

Clarke vs. German Mut. F. Ins. Co., *St. Louis (Mo.) C. A.*

41. To the question whether he owned the land in his own right, or if not who did? insured answered, "Yes, in fee simple." *Held*, that where he held the deed in fee simple, but it was not paid for, the answer was not untrue. The policy also provided that where his interest was other than the entire, unconditional and sole ownership, it must be so represented or the policy would

be void. *Held*, that this provision could not be set up in defense where no question relating to it had been asked in the application, although the insured therein consented to be bound by the conditions of the policy. The policy also provided that if the interest of insured should be changed in any manner, it should be void. *Held*, that a subsequent mortgage avoided the policy.

O'Neil vs. Ottawa Agricultural Ins. Co., Ont. (Canada) C. P.

42. A. purchased goods at auction, made part payment, and having the disposal of them, permitted them to remain in the store for sale, the auctioneer being authorized to retain certain proceeds of the sale as repayment. *Held*, that a representation that the goods were unincumbered, was not vitiated by the facts. *Held*, that an honest overestimate would not defeat recovery.

Franklin F. Ins. Co. vs. Vaughan, U. S. S. C., 2 Otto, 576.

43. Possession of premises under contract of purchase, is an equitable ownership, which justifies insurance as "his," when title is not specifically inquired into. Letting to tenants is not change of possession.

Rumsey vs. Phœnix Ins. Co., U. S. C. C. N. Y., 17 Blatch., 527.

WHAT IS NOT A CHANGE OR TRANSFER.

44. Policies, like all other written contracts, must be construed according to their terms; but since they are unipartite, being framed and signed by the insured only, they must be construed strictly as regards the company, and liberally as regards the insured. It is a rule of law to discourage wager policies, therefore provisions regarding the disclosure of the real interest of the insured will be fairly enforced to protect the company. Where it appeared that the plaintiffs were the owners of the entire beneficial interest, but being a corporation, their record title was vested in an individual, the statement in the application that the title was in the name of plaintiffs, in the absence of fraud ought not to defeat the policy. The policy provided that it should be avoided by any change in the title or possession. *Held*, that the subsequent execution of a mortgage by insured did not defeat the

policy, unless the mortgage, by reason of their insolvency or otherwise, wrought such a change in the ownership or interest, that their loss at any time before the fire would have been, or at the time of the fire was, less than the full value of the property destroyed.

American Basket Co. vs. Farmville Ins. Co., U. S. C. C. Va., 8 Ins. Law Jour., 331.

45. The mortgagor in possession is, in Massachusetts, the owner of the fee, and where his estate is in fee simple without qualifications, it is an entire and unconditional ownership, and where there is no joint tenancy he is the sole owner, and may so describe his title in the policy. A lease for years does not affect the ownership.

Wellington vs. Gale, 7 Mass., 138; Waltham Bank vs. Waltham, 10 Met., 334; White vs. Whitney, 3 Met., 81; Ewer vs. Hobbs, 5 Met., 3; Henry's Case, 4 Cush., 257; Howard vs. Robinson, 5 Cush., 119; Buffum vs. Bowditch Ins. Co., 10 Cush., 540; Farnsworth vs. Boston, 126 Mass., 1.

A policy provision that it shall be invalidated upon any sale or transfer, or upon the passing or entry of a decree of foreclosure or sale under deed of trust, or if assigned under any bankrupt law, or any change takes place in title or possession, or if the interest of the assured, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee or otherwise, be not truly stated, is not avoided by existing incumbrances not mentioned.

Ins. Co. vs. Haven, 95 U. S., 242; Jackson vs. Mass. Mut. Ins. Co., 23 Pick., 418; Taylor vs. Aetna Ins. Co., 120 Mass., 254; Manhattan Ins. Co. vs. Barker, 7 Heisk., 503.

Whether subsequent incumbrances would be a change of title, not decided.

Edmunds vs. Mutual Safety Ins. Co., 1 Allen, 311; Shepard vs. Union Mutual Ins. Co., 38 N. H., 232; Commercial Ins. Co. vs. Spankneble, 52 Ill., 53; Hartford Ins. Co. vs. Walsh, 54 Ill., 164.

Dolliver vs. St. Joseph F. & M. Ins. Co., Mass. S. J. C., 9 Ins. Law Jour., 289.

46. One of the conditions of a policy of fire insurance was, "the insurance by this policy shall cease at and from the time that the property hereby insured shall be levied on or taken into possession or custody under any proceeding in law or equity." A me-

chanic's lien was filed against the building insured, judgment obtained thereon, a *levari facias* issued and was placed in the hands of the sheriff and the property advertised to be sold, when just before the day fixed for the sale the building was destroyed by fire. *Held*, that this levy did not terminate the risk and that the insurers were liable. This condition has special if not exclusive reference to personal property, which when levied on is usually seized in fact, and remains until sold in the possession of the sheriff, who cannot be expected to guard it with the same degree of care that the owner would. The phrase "levied on," as employed in the policy, does not mean a technical levy unaccompanied by actual seizure and change of possession, and has no application, ordinarily, to proceedings by *levari facias* for the sale of real estate.

Ins. Co. vs. O'Malley, Pa. S. C., 82 Penn. St., 400.

47. A condition of a policy of insurance provided, that the assured at the time the insurance was effected, should have the "entire, unconditional and sole ownership of the property." The assured had the equitable ownership of the property, subject to the payment of the purchase money. *Held*, that he had such an ownership as entitled him to recover upon the policy. A. made a contract with B. for the purchase of a lot of ground. A. subsequently assigned this contract, a small balance of the purchase money remaining unpaid, to C. The latter at the same time made a declaration in writing, that he held said assignment as security for a debt and for further advances. *Held*, that this assignment of the contract did not deprive A. of such ownership of the property as would preclude him from recovery on a policy containing this "entire, unconditional and sole ownership" clause.

Chandler vs. Commerce F. Ins. Co., Pa. S. C., 88 Penn., 224.

48. A deed of trust was executed as security for a note, by the insured, title to be in the trustee, but possession in insured until after default. Shortly after maturity of the note, the loss occurred, the possession remaining in insured. *Held*, that the deed was not an alienation under the Georgia code, but simply the creation of a lien. Action was properly brought in name of in-

sured for use of party to whom the loss was payable. Proofs of loss were properly made by assured. Inspection and valuation of the property by the agent of the company, when insured and renewed, was *prima facie* evidence of value of each tenement at the time of loss. Occupation of some of the apartments for bar-rooms, and immoral purposes, at the time of loss, cannot affect the case, where substantially the same class of tenants occupied when insured.

Va. F. & M. Ins. Co. vs. Feagin Bros., Ga. S. C., 62 Ga., 515.

49. A partnership composed of three persons, obtained a policy of insurance on a stock of goods for one year. The policy contained the following provisions, viz.: "This policy is not assignable, unless by consent of this corporation, manifested in writing, and in case of any transfer, by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect." During the year one of the three partners retired from the firm, selling his interest in the partnership to his copartners, after which, and while the business was being carried on by the remaining members of the firm, at the same place, the goods were destroyed by fire. In a suit by the two remaining members of the firm to recover the amount of the policy, *Held*, that the sale by one partner to his copartners of his interest was not an assignment or transfer within the meaning of the policy. It was the duty of the company in view of the conflicting views of the courts, to make its intention in such case clear beyond a doubt.

Texas B. & I. Co. vs. Cohen, Texas S. C., 47 Texas, 406.

50. Policy of insurance on household goods and furniture of a married woman in Kentucky, contained a clause that policy should "cease from time the property should be levied on or taken into possession or custody under any proceeding in law or equity." An attachment against the husband was levied on the property, but was discharged before occurrence of the loss. There was no proof that the law of Kentucky differed from that of Ohio under which, since 1861, property of a married woman, acquired by

gift, cannot be taken for the debts of the husband. *Held*, that the attachment did not avoid the policy.

Miami Valley Ins. Co. vs. Stanhope, Hamilton Co. (Ohio) D. C., 10 *Ins. Law Jour.*, 159.

WHAT IS A WAIVER OF MISREPRESENTATION.

51. The policy required that if the building stood on leased ground, it must be so represented and stated in the policy. The general agent filled up the policy from a description furnished by the agent of another company, to whom the application had been made, and was taken from a policy issued by the other company, which did not state that the building stood on leased ground; the fact however was known to the general agent. *Held*, that his knowledge was that of his principal, and estopped the company from setting up the omission to state that the building was on leased ground, as a defense. Evidence showing such knowledge on the part of the agent was properly admitted.

Ins. Co. vs. Wilkinson, 13 Wall., 222; *Plumb vs. Cattaraugus Co. Mut. Ins. Co.*, 18 N. Y. R., 392; *Rowley vs. Empire Ins. Co.*, 36 N. Y., 550; 31 Conn., 526; 42 Missouri, 148; *Bidwell vs. N. W. Ins. Co.*, 24 N. Y. R., 302; *Geo. Home Ins. Co. vs. Kinnier's admr.*, and cases cited, 6 *Ins. L. J.* 497.

Held, that the failure to state the existence of an incumbrance, was not a violation of the policy condition that if the title be other than that of entire, unconditional, and sole ownership, for the sole use and benefit of the insured, it must be so stated. The provision refers to the nature of the insured's interest, not to the quality of the title.

West Rock Mut. F. Ins. Co. vs. Sheets, 26 Grat., 871; *Strong vs. Manuf. Ins. Co.*, 10 Pick., 40; *Tyler vs. Ætna F. Ins. Co.*, 16 Wend., 385; 12 Wend., 507; *Smith vs. Ins. Co.*, 17 Pa. St. Rep., 260; *Hough vs. City F. Ins. Co.*, 29 Conn., 10; *Avery vs. Hartford F. Ins. Co.*, 17 Iowa, 176; *Shepard vs. Union F. Ins. Co.*, 38 N. H., 232.

Manhattan Fire Ins. Co. vs. Weill & Ullman, Va. S. C. A., 6 *Ins. Law Jour.*, 521.

52. The plaintiff was stated in the application to be the owner of the property, subject to a \$6,000 mortgage. In fact he had purchased for \$12,000 and had paid \$6,200, the vendor having a lien for the balance, but no deed had been given. In another

answer the mortgagee's interest was stated, however, to be a "lien on mill to secure payment of sale." The exact facts were communicated to the agent, by whom the application was filled. *Held*, that the company was concluded by the act of its agent.

Eames vs. Home Ins. Co., U. S. S. C., 6 Ins. Law Jour., 689.

53. The application was not signed by the insured, and there was no evidence that she had even authorized it. It simply stated that "insurance is wanted for Mrs. Jackson in Lycoming Insurance Company," etc., "on her two-story frame dwelling situated," etc., "loss, if any, payable to Philo Carpenter, as his interest may appear," and was signed by the solicitor. The policy referred to the application, and declared if such were made, it should be a part of the policy, and a warranty; in case of misrepresentation or omission to state facts material to the risk, or if the interest of the insured were not truly stated, the policy should be void. *Held*, that the application cannot be regarded as made by the insured, and the failure to represent the true nature of her title does not avoid the policy. The policy provided that if the interest was not absolute, or the building stood on leased ground, it must be so stated to the company and written in the policy. *Held*, that if the facts were stated to the agent by the insured, their omission from the policy was the fault of the company and did not avoid the insurance. *Held*, that the failure to disclose a fraudulent or void mortgage did not avoid the policy. *Held*, that the insured in disclosing the nature of the title, must act in good faith, but is not expected to make statements that will stand the test of extreme legal refinements.

Lycoming Fire Ins. Co. vs. Jackson, Ill. S. C., 53 Ill., 302; 6 Ins. Law Jour., 305.

54. The purchaser at an execution sale of real estate, gave the defendant in the execution a written promise to reconvey, upon the payment of a specified sum by a day named; but the defendant did not bind himself to make such payment, and the promise was founded upon no consideration. On the same day the

defendant accepted from the purchaser a lease of the same premises, went into possession and paid rent, but never paid anything in redemption of the property. *Held*, that the promise for a reconveyance was a mere gratuity, giving the defendant an option to redeem, but no vested interest, and that his only interest was in the leasehold.

Gaylord vs. Lamar Fire Ins. Co., 40 Mo., 13; Hand vs. Ins. Co., 57 N. Y., 41.

A warranty is a part of the contract, and must be exactly and literally fulfilled. It is in the nature of a condition precedent, and no inquiry is allowed into the materiality or immateriality of the fact warranted.

Loehner vs. Home Mut. Ins. Co., 17 Mo., 255.

Where a representation is inserted in the policy, or where it is referred to in the policy as forming a part thereof, the representation becomes a warranty.

Conditions annexed to a policy of insurance are likewise part of the policy, and are of the same effect as if incorporated in it. By the general law of insurance, the interest of the insured in the property is not required to be specifically described in the policy.

Franklin vs. Atlantic Fire Ins. Co., 42 Mo., 459.

A party having an interest in a house and lot, as stated above, took out a policy upon the house, containing an express condition that if the interest in the property to be insured should be a leasehold, or other interest not absolute, it must be so represented to the company and expressed in the policy in writing, or the policy should be void. The policy contained no statement of the interest of the insured, but described the property as "his." The court, reversing a judgment for the plaintiff, *Held*, that if the insured truly represented his interest to the company, its failure to incorporate the statement in the policy did not avoid the policy; but if he made no representation at all, his acceptance of the policy amounted to a declaration that his interest was absolute, and that did avoid it.

Niblo vs. North American Fire Ins. Co., 1 Sandford, 561; Fletcher vs. Commonwealth Ins. Co., 18 Pick., 419; Sussex Co. Mut. Ins. Co. vs. Woodruff, 2 Dutcher, 541.

Mers vs. Franklin Ins. Co., Mo. S. C., 68 Mo., 127; 8 Ins. Law Jour., 127.

55. H. effected insurance on property described in the policy as his, occupied by a tenant. The property was in the possession of S., who claimed the land under a tax title and purchase at sheriff's sale. Suit of ejectment had been previously brought by H., who obtained judgment, but no writ of possession had been taken out, and S. was still in possession and entitled to a new trial. It was in evidence that the nature of H.'s claim was stated to the agent in a general way by the counsel of H., who showed him the brief in the ejectment suit, and told him the result. It did not appear whether the agent was expressly informed of the nature of the claim, further than the condition of the litigation; the policy was filled up by the agent, without a written application, and was a warranty. *Held*, that it was not clear that the misrecital of fact avoided the policy as a matter of law. *Held*, that instructions which assumed that the true nature of the claim was not explained to the agent, were erroneous.

Hurd vs. St. Paul F. & M. Ins. Co., Mich. S. C., 39 Mich., 443; 8 Ins. Law Jour., 282.

56. Where it appeared that the agent who wrote the policy, was fully informed that others besides the insured were interested in the property, there was evidence for the jury of a waiver of the policy stipulation, that if the interest was other than that of sole ownership it must be so expressed. Where such waiver is relied on, the insured is not required in Wisconsin to proceed for a reformation of the policy; the assured may count on the policy as written, and show the waiver.

Smith vs. Commonwealth Ins. Co., Wis. S. C., 49 Wis., 322; 9 Ins. Law Jour., 652.

57. The policy provided that if the property was incumbered, it should be void. The property was incumbered by a mortgage, while the application stated that it was unincumbered. *Held*, that when the application is prepared, signed and presented by the owner of the property, the insurance company has the right to rely upon the truth of the statements therein contained, and if the statements are false in a material point, the company may refuse to be bound by the policy. But when the assured makes a

full and complete disclosure of the title and situation of the property to the agent of the company, and the agent deliberately writes false answers to be signed by the assured, the company will be estopped from denying its liability.

Atlantic Ins. Co. vs. Wright, 22 Ill., 473; *M. Ins. Co. vs. Chestnut*, 50 Ill., 116; *Andes Ins. Co. vs. Fish*, 71 Ill., 620.

Germania F. Ins. Co. vs. McKee, Ill. S. C., 94 Ill., 494; 9 *Ins. Law Jour.*, 350.

58. If the agent has notice of the title of the assured, and does not insert it in the policy, the company cannot claim that the title was not disclosed to the company and inserted in the policy.

Atlantic Ins. Co. vs. Spankneble, 52 Ill., 531.

Phœnix Ins. Co. vs. Zucker, Ill. S. C., 12 Ill., 64; 9 *Ins. Law Jour.*, 193.

59. The insurance was on wheat in elevator through open policy, in the name of the general agent, with the design that he should retain the custody of the instrument and create an insurance in favor of third parties by issuing certificates of the fact. The insurance was effected by B. & Co., warehousemen. Prior to the execution of the contract they had delivered to R., the plaintiff, warehouse receipts as security. No mention of the fact was made in the policy, which provided that if the interest of the insured were other than the entire, unconditional and sole ownership, it must be so represented and expressed or the policy would be void. *Held*, that where the alleged qualified title of insured was not a matter of litigation in the trial, a finding in favor of the company on the ground of a violation of the provision to which no exception was taken, does not enable the court on appeal to decide whether the interest of B. & Co. was a sole and unconditional ownership. *Held*, that if B. & Co. informed the agent of the facts, and he failed to make the proper indorsement before delivering certificates to B. & Co., this was a waiver of the policy provision.

Trustees, etc. vs. Brooklyn Fire Ins. Co., 19 N. Y., 305; *Sheldon vs. Atlantic Ins. Co.*, 26 id., 460; *Pitney vs. Glens Falls Ins. Co.*, 65 id., 6; *Van Schaick vs. Niagara Ins. Co.*, 68 id., 434.

Held, that in the view of the circumstances, and the finding of fact on the trial, that the insured had duly kept and performed all the conditions of the policy, the burden of proving a breach of condition was on the company, and a finding in its favor on appeal on the ground of a violation of the provision requiring qualified ownership to be indorsed, in the absence of any evidence that the insured had not correctly informed the agent, cannot be sustained. *Held*, that where there was no specification in the policy as to the ownership of the wheat, it does not necessarily follow that a parting of legal title through receipts by the warehousemen divested them of all insurable interest. *Held*, that where other insurances were issued upon the property by the same agent, his failure to indorse consent on the policy was a waiver of the provision requiring such consent.

Richmond vs. Niagara F. Ins. Co., N. Y. C. A., 79 N. Y., 230; 9 Ins. Law Jour., 117.

60. The policy provided that "if the interest of the assured in the property be any other than the entire unconditional and sole ownership, it must be so represented to the company, and so expressed in the written part of the policy," otherwise the policy should be void. *Held*, even if the assured was not the entire, unconditional and sole owner, yet if the real character of the title was known to the officers of the company, it would be liable notwithstanding the nature of the title was not expressed in the written part of the policy. The company having knowledge of the nature of the interest claimed by the assured, and he not being present, it was the duty of the policy clerk, acting for the company, to have expressed the nature of that ownership in the policy. Where insurance is procured to be taken by a soliciting broker, who is, in fact, acting as the agent of the company, declarations and explanations made by the assured to such agent, concerning the character of the ownership of the property, will be notice to the company, and this notwithstanding there be a condition in the policy that such broker shall be deemed the agent of the assured and not of the company.

Union Ins. Co. vs. Chipp, Ill. S. C., 93 Ill., 96.

WHETHER THE POLICY IS AVOIDED IN PART OR IN WHOLE.

61. Where cotton was raised by insured under an agreement that F. in control of the plantation by which insured were to be reimbursed for all outlays, and the balance to be divided, and the reimbursement covered the whole value of the cotton; *Held*, that insured were entitled to recover under a policy which required that they should be sole owners, and in which nothing was said of the interest of F. But as to implements that were to be divided, the insured were not entitled to recover; nor for insurance on their interest in a gin house on account of repairs, where the loss was a mule power in the gin house.

Noyes et al. vs. Hartford F. Ins. Co., N. Y. C. A., 3 Ins. Law Jour., 44.

62. The question in the application: "What is your title or interest in the property?" was answered in a single word "Deed." The application was a warranty. *Held*, that this did not necessarily import an unqualified grant in fee of a freehold estate. The answer is elliptical, and in the absence of bad faith there was no breach of warranty where the plaintiff had an interest or title that had its origin in a deed. At the time of effecting the insurance there were two mortgages on the property, which had been foreclosed, sale had, and judgment for deficiency entered; but the amount due on them had been paid over and accepted, though not technically discharged on the record. *Held*, that the mortgages were not a legal incumbrance, and there was no breach of a warranty that there was no incumbrance on the premises. The policy provided that if the property insured should be afterward incumbered, the insurance should be void until the written consent of the company was obtained. The insurance was upon buildings and chattel property in them, valued separately. The buildings were afterward incumbered without consent. *Held*, that while the policy was void as to the buildings, the valuations being separate though the premium was entire, the contract was separable, and the insurance was valid as to the chattels.

Cases considered of *Johnson vs. Johnson*, 3 B. & P., 162; *Mayfield vs. Wadley*, 3 B. & C., 357; *Robinson vs. Green*, 3 Met., 159; *Carleton vs. Woods*, 8 Foster (N. H.), 290; *Miner vs. Bradley*, 22 Pick., 457; *Barnes vs. Union Mut.*

Fire Ins. Co., 51 Maine, 110, and cases there cited; Friesmuth vs. Agawam Mut. Fire Ins. Co., 10 Cush., 587; Fire Ass'n vs. Williamson, 26 Penn St., 196; Loehner vs. Home Mut. Ins. Co., 17 Mo., 247 and 19 Mo., 627; Phoenix Ins. Co. Lawrence, 4 Met. (Ky.), 9; Clark vs. New England Ins. Co., 6 Cush., 342; Hartford Ins. Co. vs. Walsh, 54 Ill., 164; Koontz vs. Hannibal Savings Ins. Co., 42 Mo., 126; Date vs. Ins. Co., 14 Up. Can. Com. Pl., 540; Deidericks vs. Com. Ins. Co., 10 J. R., 233; French vs. Chen. Mut. Ins. Co., 7 Hill, 122; Wilson vs. Herkimer Ins. Co., 6 N. Y., 53; Chaffee vs. Catt. Co., Mut., Ins. Co., 18 N. Y., 376; Heacock vs. Saratoga Mut. Fire Ins. Co., N. Y. C. A., 1876; Perkins vs. Hart, 12 W. Wheaton, 237-251; Rodeman vs. Hazlehurst, 9 Gill, 294; Brown vs. Vinal, 3 Metc., 533; Curtis vs. Leavitt, 15 N. Y., 123.

Merrill vs. Agricultural Ins. Co., N. Y. C. A., 73 N. Y., 452; 7 Ins. Law Jour., 531.

63. The insurance was on a building and on personal property therein. The policy was by its terms avoided by false representations as to title to the building. *Held*, that while there may be cases where such policies are properly divisible, and where a violation in respect to one subject matter will not forfeit as to all, the doctrine will not apply to a case like the present, where the risk of the whole is increased by want of interest in a part.

Etna Ins. Co. vs. Resh, Mich. S. C., 9 Ins. Law Jour., 547.

64. The question in the application, "Is your property incumbered, by what, and to what amount, and to whom?" was answered, "Mortgage of \$1,200." *Held*, that the answer was a material representation, which if false, avoided the policy.

Ryan vs. Springfield F. & M. Ins. Co., 46 Wis., 671.

The application was made a warranty, and was filled up by the agent. *Held*, that if he failed to inform the agent of other incumbrances, the policy was void, and in case of disputed evidence on this point, the question of fact was for the jury.

Cooper vs. Farmers' Fire Ins. Co., 50 Penn. St., 297; Ryan vs. Ins. Co., supra; Davenport vs. New England Ins. Co., 6 Cush., 340; Haywood vs. Same, 10 Cush., 444; Wilbur vs. Bowditch M. Ins. Co., id., 446; Towne vs. Fitchburg M. Ins. Co., 7 Allen, 51.

Held, that where the policy was on real estate and contents therein, a misrepresentation of title which avoided it as to the first, avoided it *in toto*.

Hinman vs. Hartford Fire Ins. Co., 35 Wis., 159; Lovejoy vs. Augusta M. Fire Ins. Co., 45 Maine, 472; Day vs. Charter Oak F. & M. Ins. Co., 51 do., 91.

Held, that where a policy covers personal property in a building, and other property is subsequently added to which the risk would attach under the general language used, and such addition is subsequently mortgaged without consent, in violation of the policy provision, a claim for damage to such mortgaged portion will work a forfeiture of the whole insurance; but the rule would be otherwise if the insured made no claim that such mortgaged portion was covered.

Schumitch vs. American Ins. Co., Wis. S. C., 48 Wis., 26; 9 Ins. Law Jour., 56.

65. Plaintiff furnished railroad ties which were examined by company's inspector provisionally, and monthly payments were made on that basis. Ties were not fully accepted until examined one by one as they were laid in place. *Held*, that an acceptance by the company which would defeat plaintiff's recovery for a loss must be such as would pass the title and bind the company to pay for them. Whether the acts of the parties amounted to an acceptance, was properly a question for the jury.

Chandler & Co. vs. St. Paul F. and M. Ins. Co., Minn. S. C., 21 Minn., 85; 4 Ins. Law Jour., 99.

WHO IS ENTITLED TO INSURANCE MONEY IN CASE OF LOSS.

66. Fire insurance policies on a stock of goods, do not pass by a sale of all the vendor's personal property.

White vs. Robbins, Minn. S. C., 21 Minn., 370.

67. A., owning personal property, gave to B. a mortgage of the same to secure a debt he owed him, after which he procured an insurance upon said property, and had the policy issued to and in the name of A., but payable in case of loss to B., as his interest might appear. Afterward B. bought one undivided half of this property, giving up the mortgage debt in part payment for the same, and entered into partnership with A. in business and in the use of said property. *Held*, that there was no need for any transfer or assignment of the policy of insurance; and that in case of loss the creditors of the firm would hold the funds in the

hands of the insurance company upon the trustee process, in preference to the creditors of either of the individual partners.

Burbank & Son vs. McCluer & Co., and Trustees, N. H. S. C., 5 Ins. Law Jour., 4.

68. The contract of insurance does not attach to the property insured, nor in case of sale, either before or after loss, does it pass to the purchaser by operation of law, in the absence of a stipulation to that effect. It is a contract of indemnity against the loss covered by the policy, and inures to the benefit of the person with whom it is made, or those falling within its terms. As soon as the interests of such persons cease, it is at an end. As between vendor and vendee, under a valid and subsisting contract of sale of real estate, covered by a policy of insurance, where a loss insured against occurs after the date of the contract and before conveyance, the true test for determining to whom the money recovered on the policy belongs, in the absence of stipulations governing, is to determine who was the owner, and which party actually sustained the loss.

Gilbert et al. vs. Port, Ohio, S. C., 6 Ins. Law Jour., 650.

69. C. as the agent of L., having entered into a contract of assurance with defendant and paid the premium with L.'s money, could not direct the insurance money to be paid to his own creditor; it belonged to his principal.

Pritchett vs. Mech. & Traders' Ins. Co., La. S. C., 27 La., 525.

70. Money due on a policy of insurance procured by a married woman on buildings situated on property the title to which has been conveyed to her in fraud of her husband's creditors, is not the proceeds of the property, and cannot be subjected by the husband's creditors to the payment of his debts. She can, in such circumstances, make a valid contract of insurance, which, being between the insurer and the insured, exclusively for the indemnity of the latter, cannot be defeated by third persons.

Bernheim vs. Beer, Miss. S. C., 56 Miss., 149.

71. Under the terms of the lease, the landlord covenanted to insure, and the tenant had the option to purchase for a fixed sum.

Before the time for exercising the option, the premises burned, and the landlord received the insurance. *Held*, that the tenant upon exercising his option to purchase, had no claim to the insurance money.

Edwards vs. West, Eng. Ch. L. R., 7 Ch. D., 858.

72. At the date of a contract for the sale of a house, and before completion of the purchase, the house was damaged by fire, and the vendors received the insurance money from the insurance company, under a policy existing at the date of the contract. The contract contained no reference to the insurance. In an action by the purchasers against the vendors: *Held*, that the purchasers were not entitled to recover the moneys from the vendors, or to be allowed to have the amount deducted from their purchase money, or to have the moneys applied in reinstatement of the premises.

Rayner vs. Preston, Eng. Ch., 10 Ins. Law Jour., 74.

73. Testator devised his real estate, part to his executors as trustees, and part to his children in fee, but no disposition was made of the policies on the property. *Held*, that all the policies remained a part of the personal estate of the testator, to be accounted for by the executors. They were in no sense the property of the trustees or devisees unless purchased from the executors for a valuable consideration. The policies could not be converted by either to keep the property insured. The return premiums must be collected from the insurers in behalf of the estate or the policies purchased by the trustees and devisees.

Estate of Hurley, Philad. (Pa.) Orphans' Court, 9 Ins. Law Jour., 158.

See Cross Index for other cases bearing on TITLE.

TRUSTEES AND EXECUTORS.

ABSTRACT OF THE LAW.

a. Trustees may insure the trust property to its full value and recover for the benefit of the *cestuis que trust*, but they are not obliged to do so. It is not necessary that all the trustees join in the insurance; one may insure in behalf of the rest. The *cestui que trust* may also insure.

Finney vs. Ins. Co., 5 Met., 192; *Crawford vs. Hunter*, 8 T. R., 13; *Ins. Co. vs. Chase*, 5 Wall., 509; *Franklin Ins. Co. vs. Coates*, 14 Md., 238; *White vs. Hudson River Ins. Co.*, 7 How. Pr., 351.

b. The same doctrine applies to executors and administrators, in regard to the personal estate, and when through the terms of the will or by reason of debts, they have a trust interest in the real estate, but not otherwise as to the latter. The insurance being personal, does not usually follow the subject, but belongs to the executors in trust.

Clinton vs. Hope Ins. Co., 45 N. Y., 454; *Savage vs. Howard Ins. Co.*, 52 N. Y., 502; *Phelps vs. Gebbhard Ins. Co.*, 9 Bosw., 404; *Wyman vs. Prosser*, 36 Barb., 353; *Wyman vs. Wyman*, 26 N. Y., 253.

See further on this subject under INSURABLE INTEREST.

See Cross Index for cases bearing on TRUSTEES and EXECUTORS.

UNAUTHORIZED INSURANCE.

DIGEST OF RECENT CASES.

UNAUTHORIZED INSURANCE—LIABILITY OF AGENTS.

1. The provisions of chap. 463 of the New York laws of 1853, as amended by chap. 300 of the laws of 1862, and chap. 328 of the laws 1865, are sufficiently broad to sustain an action against the agent of a foreign plate-glass company which had not complied with the laws of New York, for transacting unauthorized insurance in that State. Recovery may be had under chap. 334 of the laws 1861. The form of statement is prescribed by

the act of 1853, and a penalty was incurred under the act of 1861; by reason of failure to file a statement, as well as under that of 1853, for failure to deposit the securities and file the certificate. The only effect of the act of 1873 was to reduce the deposit from \$100,000 to \$50,000. An objection that the act of 1853 was not specifically pleaded is not fatal.

Nellis vs. N. Y. Cent. R. R. Co., 30 N. Y., 505.

People vs. McCann, N. Y. C. A., 6 *Ins. Law Jour.*, 205.

2. An agent who issues a policy and accepts the premium after the revocation of the company's authority, is liable to the insured for a return of the premium, though not aware of the revocation, and though the required notice had not been given by the superintendent.

McCutchen vs. Rivers, Mo. S. C.

3. An insurance broker without having obtained the certificate required by the insurance law of Wisconsin of 1871 for companies seeking to do business in that State, solicited the insurance of one M., showing a list of companies in which he could place the insurance, among which were the companies in which the risk was placed. But the insurance was not solicited specifically for these companies. *Held*, that the act of placing the insurance in the companies, rendered the broker their agent in the solicitation within the meaning of the statute, that whoever solicits insurance on behalf of any fire, etc., company, or transmits for any person other than himself an application for insurance, or a policy of insurance, to or from said company, shall be held to be the agent of such company. *Held*, that under the statute, the agent was liable for each company for which the solicitation was made, as a separate offense.

State of Wisconsin vs. Farmer, Supreme Court of Wisconsin.

EFFECT ON THE CONTRACT.

4. The Michigan statute against unauthorized insurance, does not prohibit an unauthorized company from contracting in another state for insurance on Michigan property. *Quere*, whether

an unauthorized company may defend against an action brought in a Michigan court on a Michigan contract, by pleading its own misconduct.

Clay Fire and Mar. Ins. Co. vs. Huron Salt and Lumber Mfg. Co., 31 Mich., 346; 4 Ins. Law Jour., 858.

5. A foreign insurance company cannot recover against one of their members for taxes or assessments levied against him as one of the persons insured, when their agent has not complied with the statutes of New Jersey relative to foreign insurance companies. A recovery cannot be had, unless it appears that the losses for which a member is assessed, occurred during the life of his policy.

Stewart vs. Northampton Ins. Co., N. J. C. E., 38 N. J., 436.

6. In an action in Michigan to recover on a premium note given to a foreign company, where there is nothing in the note or the record to show that it was a Michigan contract, the court will not presume that the note was given in violation of the law regarding unauthorized insurance, and a refusal to admit the note as evidence, because the company did not offer to prove that it had complied with the laws of the State, was error.

American Ins. Co. vs. Cutler, Mich. S. C., 6 Ins. Law Jour., 660.

7. The Indiana statute of 1852 provided that "foreign corporations shall not enforce, in any of the courts of this State, contracts made by their agents before a compliance with the provisions of the statute." The agent of such a company, not authorized to make contracts, but only to receive money, or proposals, or premium notes, and forward them to the company for its action, received from a citizen of Indiana a proposal and premium note, which he forwarded to the company. The company accepted the risk and issued a policy, which it mailed to the insured. *Held*, that this was not a contract made by the agent within the meaning of the statute, but by the company. *Held*, that though the agent was liable under the statute, the fact that he had failed to comply with its provisions, was no defense to a suit brought

upon the note. *Held*, that the policy was valid and could be enforced through the courts.

The cases of *Lamb vs. Lamb*, 6 Bissell, 420; *Rising Sun Ins. Co. vs. Slaughter*, 20 Ind., 520; *New England F. & M. Ins. Co. vs. Robinson*, 25 Ind., 535; *Union Cent. Life Ins. Co. vs. Thomas*, 46 Ind., 44; *Reynolds vs. Geary*, 23 Conn., 179, discussed.

Bowser vs. Lamb, Assignee, U. S. C. C. Ind., 6 *Ins. Law Jour.*, 315.

8. Policies issued, and premium notes taken, by foreign companies in Indiana, are not void because of non-compliance with the statutes authorizing them to do business within the State, but the remedy on such notes is suspended until a full compliance has been made with the law.

Smith vs. Little, Ind. S. C., 1879; *Farmers and Merch. Ins. Co. vs. Harrah*, 47 Ind., 235; *Walter A. Wood Mowing Machine Co. vs. Caldwell*, 54 Ind., 270; *American Ins. Co. vs. Pettijohn*, 62 Ind., 352; *Daly vs. National Life Ins. Co. of U. S.*, 64 Ind., 1; *Singer Manufacturing Co. vs. Brown*, 64 Ind., 548.

American Ins. Co. vs. Wellman, Ind. S. C., 9 *Ins. Law Jour.*, 422.

9. One of the objects of the statute requiring soliciting agents or surveyors of insurance companies, doing business in this State, to have a certificate of authority to act from the insurance commissioner, is the protection of the people against worthless foreign corporations, and, as the assured is not required to see that the laws have been observed before making a contract, a foreign corporation which has violated the law in making a contract and securing its consideration from an innocent citizen, cannot escape liability for a loss by setting up its own turpitude. Against an innocent party, "no man shall set up his own iniquity as a defense any more than as a cause of action."

Watertown F. Ins. Co. vs. Simons, Pa. S. C., 9 *Ins. Law Jour.*, 597.

10. Foreign insurance companies which do business in Pennsylvania, without complying with the statute relating to foreign insurance companies, cannot set up their turpitude to defeat actions on their contracts brought by innocent persons. The statute does not impose upon the insured the duty of seeing that the

insurer and its agents have complied with the statutory requirements.

Sican vs. Watertown F. Ins. Co., Pa. S. C., 10 Ins. Law Jour., 392.

11. A law of New Jersey prohibits any foreign company from transacting business connected with insuring property situated in the State, without compliance with the laws, and further provides for the authorization of agencies, and prescribes penalties for agents acting without authority. In an action to recover premium note assessments; *Held*, that comity requires the enforcement of contracts made in other States, and valid there, unless clearly prohibited by statute. The legislature has power to invalidate in the courts, insurance contracts made in other States on property in New Jersey, but the court will not impute such an intention unless the language of the statute admits of no other reasonable construction. Nothing in the statute invalidates the rule, that the law of the place where a contract is made or to be performed is to govern as to the validity and construction of the contract. The acts of New Jersey are for the protection of the public against irresponsible companies, and impair the validity of contracts made in violation of them, at least so far as concerns the right of the corporation to sue, but public policy may require that the insured be permitted to enforce the agreement. The declaration must show that when the assessment was made on the premium notes the defendant was a member of the corporation, and, as such, liable to assessment. If the policy had expired the defendant could not be held without alleging that the loss accrued before its expiration. If the policy was alive, the losses must have accrued while it was in force.

Columbia F. Ins. Co. vs. Kinyon, N. J. S. C., 4 Ins. Law Jour., 225.

12. By failing to comply with the requirements of the Arkansas Statute, prescribing the terms upon which insurance companies of other States may do business in that State, such companies and their agents and brokers render themselves liable to the penalties denounced by the act, but such failure does not affect the validity of the policies issued by them or in any manner oper-

ate to the prejudice of the policy holder. A statute of Arkansas provides that no insurance company not of that State shall do business in the State until it has filed with the auditor a stipulation in writing, agreeing that legal process affecting the company, served on the auditor of State, shall have the same effect as if served personally on the company. *Held*, that when an insurance company does business in the State, and issues policies to citizens of the State, on property within the State, that in a suit on such a policy, service of process on the auditor is good personal service on the company, although the written stipulation to that effect was not filed with the auditor: That in such case the company was estopped to say that it had not filed the stipulation and had not assented to such service.

Ehrman vs. Teutonia Ins. Co., U. S. D. C. Ark., 9 Ins. Law Jour., 393.

See Cross Index for other cases bearing on UNAUTHORIZED INSURANCE.

USAGE.

ABSTRACT OF THE LAW.

a. Insurers are bound to know the usages connected with the trades or occupations which they insure.

Livingston vs. Maryland Ins. Co., 7 Cranch., 506.

b. In general the insurers will be presumed to contract with such usages in view, but proof of usage cannot be allowed to overrule express stipulations in the contract inconsistent therewith.

Lattomus vs. Farmers' Ins. Co., 3 Houst., 254; Winthrop vs. Union Ins. Co., 2 Wash. C. C., 7; Ohio vs. Mutual Safety Ins. Co., 1 Sandf., 137; Stebbins vs. Globe Ins. Co., 2 Hall, 632; St. Nicholas Ins. Co. vs. Mercantile Mutual Ins. Co., 5 Bos., 238.

c. Evidence of usage, however, is admissible in case of ambiguity, where it can fairly be inferred from the character of the risk and the language of the contract, that the insurance was effected with a view to such usage.

Hancox vs. Ins. Co., 3 Sum., 132; DeForrest vs. Fulton Ins. Co., 1 Hall, 84; Citizens' Ins. Co. vs. McLoughlin, 53 Penn. St., 485.

d. The usage, however, must be such as is general and familiar, and not of a merely local character.

Cobb vs. Lime Rock F. & M. Ins. Co., 58 Me., 326; Hartford Protection Ins. Co. vs. Harmer, 2 Ohio St., 452.

DIGEST OF RECENT CASES.

USAGE—PROOF OF.

1. The captain of a steamboat navigating the Ohio and its tributaries, under direction of a part owner, executed a premium note for insurance at Pittsburgh. *Held*, that such a usage is not required for the advancement of trade, is derogatory to the rights of the owners, and can only be established by evidence that is clear, uncontradictory and distinct, to bind the other owners.

Adams vs. Pittsburgh Ins. Co., Pa. S. C., 4 Ins. Law Jour., 637.

2. The practice of "Double tripping" on a western river is not so unreasonable that a court should take it from the jury as a matter of legal instruction. If such method of towing was usual, instruction that such usage of trade fell within the terms and protection of the policy was not error.

Pittsburgh Ins. Co., vs. Dravo & McDonald, Pa. S. C., 5 Ins. Law Jour., 126.

3. There is great necessity for giving effect to a custom in regard to the insurance of a steamboat in the custody of one not the owner. The perils of navigation are so well known that a due regard for some indemnity against loss is justly recognized as a necessary precaution. To establish the validity of a custom, the usage must have existed so long as to have become generally known, and it must be clearly and distinctly proved. The law prescribes no certain number of witnesses to establish the fact, although the concurring testimony of a large number may increase the probability of its being generally known. Nine witnesses testified to the existence of a custom at the port of Pittsburgh, Pa., for the captain of a steamboat to take policies of insurance, and give premium notes, on behalf of the owner or owners; that while there were occasional departures from this method, the general usage was as stated, and that the authority of the captain to give the note was always presumed and no inquiry

made of the owner. *Held*, that the evidence of the custom was sufficient to submit to the jury.

Vanhearth vs. Turner, Winch. Rep., 24; *Vanness vs. Packard*, 2 Pet. U. S. Rep., 148; *Gordon vs. Little*, 8 S. & R., 533; *Eyre vs. Mar. Ins. Co.*, 5 W. & S., 116; *Snowdon et al. vs. Warder*, 3 Rawle, 101; 1 Phil. on Ins., 83, 518; *Smith vs. Wright*, 1 Caines Rep., 43; *Oliver vs. Green*, 3 Mass., 134; *DeForrest vs. Fulton F. Ins. Co.*, 1 Hall, 94; *Stackpole vs. Arnold*, 11 Mass., 27; *McMaster vs. Pennsylvania Railroad Co.*, 19 P. F. Smith, 374; *Carter vs. Philadelphia Coal Co.*, 27 id., 286.

Adams vs. Pittsburgh Ins. Co., Pa. S. C., 10 *Ins. Law Jour.*, 673.

See Cross Index for other cases bearing on USAGE.

USE OR OCCUPATION.

ABSTRACT OF THE LAW.

a. The use or occupation of the subject of insurance, is generally merely descriptive of its present character, and not a warranty as to the future, but if from the character of the risk, or language of the contract, it was the manifest intention of the parties that it should be a warranty *in futuro*, it will be construed accordingly.

Catlin vs. Springfield F. Ins. Co., 1 Sum., 434; *Stebbins vs. Globe Ins. Co.*, 2 Hall, 632; *Frisbie vs. Fayette Ins. Co.*, 27 Penn. St., 325; *O'Neil vs. Buffalo Ins. Co.*, 3 N. Y., 122.

b. A change of use, in order to avoid the policy, unless a future warranty, must be such as materially increases the risk.

Jefferson Ins. Co. vs. Cotheal, 7 Wend., 72; *Hobby vs. Dana*, 17 Barb. (N. Y.), 111; *Sarsfield vs. Metropolitan Ins. Co.*, 61 Barb. (N. Y.), 479.

c. A violation must be something more than an occasional or temporary use.

Houghton vs. Manufacturers' M. and F. Ins. Co., 8 Met. (Mass.), 114; *Williams vs. New England Ins. Co.*, 31 Me., 219.

d. But a statement, if material or a warranty, must be true as to the existing character of the premises.

Jennings vs. Chenango Co. Mutual Ins. Co., 2 Denio, 75; *Smith vs. Mechanics and Traders' Ins. Co.*, 82 N. Y., 399; *Billings vs. Tolland Co. Mut. Ins. Co.*, 20 Conn., 139.

e. The mere unlawful use of the property, will not generally work a forfeiture, in the absence of increased risk or special prohibition.

Boardman vs. Merrimac Ins. Co., 8 Cush. (Mass.), 386; *Hall vs. People's Mutual Ins. Co.*, 6 Gray (Mass.), 185.

f. If the policy prohibit an unlawful use, the violation must be more than of a mere temporary character.

Aurora F. Ins. Co., vs. Eldie, 55 Ill., 213; *Boardman vs. Merrimac Ins. Co.*, 8 Cush. (Mass.) 594; *Campbell vs. Charter Oak Ins. Co.*, 10 Allen (Mass.), 213.

See further on this subject under DESCRIPTION, KEEPING AND STORING, POLICY, PROHIBITED RISKS, VACANT.

DIGEST OF RECENT CASES.

USE OR OCCUPATION—WHAT WILL AVOID THE POLICY.

1. If a person is engaged in the unlawful business of selling intoxicating liquors without a license, at the time of the making and acceptance of a policy of insurance on his stock in trade, and for a month afterward, the policy does not attach, although he makes an application for a license immediately after he begins such business.

Laurence vs. National Fire Ins. Co., Mass. S. J. C., 127 Mass., 557.

WHAT WILL NOT AVOID THE POLICY.

2. Use of the property different from that stated in the application, will not avoid the policy if the agent took the application and issued the policy with a full knowledge of the facts.

Imp. F. Ins. Co. vs. Shimer, Ill. S. C.

3. The policy provided, that "if the occupation of the premises should be changed from one of the class denominated extra hazardous, or specially hazardous, to that of another of the same class, except as specially agreed to in writing upon the policy, then, so long as the same should be so appropriated, the policy should cease and be of no force." Under the class "extra hazardous," on the back of the policy, was enumerated "all workshops, mills, and manufacturing establishments" not enumerated in either of the two other classes. The property was insured as of the third class, and was described in the policy as "occupied for the manufacture of toys." The agents examined the premises, and knew that some custom sawing and planing and turn-

ing of mop handles had been done there for several years ; and acted on their knowledge in placing the insurance. After the insurance was effected, the property was used for the manufacture of toy trunks, nursery chairs, berry and market baskets, table mats, chair stretchers, and mop handles, and also for doing a very small amount of custom sawing and planing. *Held*, that there was no change of occupation within the meaning of the policy, and there was no such change of use as would vitiate the policy. The knowledge of the agents was notice to the company as to the use. A policy of insurance should be construed most strongly against the insurer, and liberally in favor of the assured. The tenant of the premises insured, who had charge of all the business done thereon, and knew of all of its details and processes, was produced as a witness and asked if the business he was carrying on at the time of the fire was any more hazardous to the insurance than the manufacture of toys. *Held*, that the answer was admissible. Plaintiffs offered evidence of the admissions of L., whom their evidence tended to prove to have been the agent of defendant, specially authorized to settle their loss. *Held*, admissible.

Brink & Co. vs. Merchants' Ins. Co., Vt. S. C., 49 Vt., 422.

4. Where it was stated in the application that the insured building was occupied as a dwelling, when upon proof of loss the occupation was shown to be that of a boarding house ; *Held*, that it does not avoid the policy that the building is, or was after the insurance, occupied as a boarding house, unless it can be shown that the risk was increased.

Planters' Ins. Co. vs. Sorells, Tenn. S. C., 4 Ins. Law Jour., 95.

5. The policy provided that the business to be carried on was the manufacture of bath-tubs. The business of planing and sawing lumber was carried on in an adjacent building, and the shavings were conducted by a tube to the boiler-room in the insured building where they were used for fuel. *Held*, that this was not carrying on the business of planing and sawing lumber in the

insured building, and was not a violation of the policy provision.

Keeney vs. Home Ins. Co. of Columbus, N. Y. C. A., 7 Ins. Law Jour., 108.

6. The building insured in a mutual company as a hotel, had, it was claimed, been changed to a house of prostitution. The policy contained no prohibition against changing the use, but the by-laws stipulated as follows: "Buildings used or occupied for illegal purposes, (as for houses of ill fame,) or property contained in such buildings or directly endangered by them, are not allowed to be insured. If buildings previously insured are appropriated to such uses during the time of insurance, the agent must either insist upon the removal of the danger or cancellation of the policy." *Held*, that by the fair meaning of this by-law, it was the duty of the agent of the insurer to ascertain whether the property, after insurance, had been put to an illegal or immoral use or not, and if so, the consequence was not the forfeiture of the policy, but it then became the duty of the agent to "insist upon the removal of the danger or cancellation of the policy." *Held*, that the change of use was not an increase of risk. *Held*, that the illegality of the use did not relieve the insurer of liability, nor did negligence or misconduct on the part of the insured, unless coupled with an intent to destroy the building by fire.

Franklin Life Ins. Co. vs. Humphrey, 65 Ind., 549; Chandler vs. Worcester Mutual Fire Ins. Co., 3 Cush., 328; Waters vs. Merchants' Louisville Ins. Co., 11 Peters, 213; Columbia Ins. Co. vs. Lawrence, 10 Peters, 507; Grant vs. Howard Ins. Co., 5 Hill, 10; Gates vs. Madison County Mutual Ins. Co., 1 Sellers, 469; Hoffman vs. Aetna Fire Ins. Co., 32 N. Y., 405; Rowley vs. Empire Ins. Co., 36 N. Y., 550; Campbell vs. Merchants and Farmers' Mutual Fire Ins. Co., 37 N. H., 35; Niagara Fire Ins. Co. vs. De Graff, 12 Mich., 124; Peoria Marine and Fire Ins. Co. vs. Hall, ib., 202; Commercial Ins. Co. vs. Spankneble, 52 Ill., 53.

Behler vs. Germ. Mut. Ins. Co., Ind. S. C., 9 Ins. Law Jour., 778.

7. The use of kerosene oil on a single occasion, is not a violation of a policy condition excluding from liability for loss through its use, though the loss resulted from insured entering the barn with a kerosene lamp.

Matson vs. Ins. Co., N. Y. S. C., 16 N. Y. S. C., 415.

8. A prohibited use notified to the company, which thereafter treats the policy as subsisting, though notified, is waived.

Witte vs. Ins. Co., Mo. C. A., 1 Mo. App., 188.

EVIDENCE RELATING TO.

9. *Proofs of Loss.*—The building was described in the policy as “occupied as a dwelling;” it was in reality partly occupied as saloon or grocery. It was shown by parol evidence that the insured and local agent who filled out and issued the policy, both knew that it was also otherwise occupied, but deemed the term adequate to describe it, and that doubts expressed by the insured were quieted by the assurances of the agent to that effect. *Held*, that the phrase “occupied as a dwelling,” in a policy is ordinarily a warranty that at the time of issuing the policy, the building is occupied in that way only.

Alexander vs. Germania Fire Ins. Co., N. Y. C. A. (5 Ins. Law Jour., 360), citing Wall vs. East River Ins. Co., 7 N. Y., 370; Parmalee vs. Hoffman Fire Ins. Co., 54 ib., 193.

The words having a fixed legal construction, the insured cannot in an action at law, vary their purport by parol evidence.

Pindar vs. Resolute Fire Ins. Co., 47 N. Y., 114.

But parol evidence tending to show that the insured sought to have the words corrected, and was dissuaded by the insurer, was admissible to estop the insurer from setting up the letter of the contract as a bar to recovery. Such evidence may also be received if it tends to make a case in equity for the reformation of the contract. Evidence showing that the insurer and insured meant to insure the building that was burned, but, by a misconception as to the meaning and effect of the language, used terms in the policy which misdescribed it, and released the company from legal liability, makes a proper case for the reformation of the contract, and is admissible for that purpose.

Many vs. Beekman Ins. Co., 9 Paige, 188; Pitcher vs. Hennessy, 48 N. Y., 415; McCall vs. Ins. Co., N. Y. C. A., Sept., 1876 (6 Ins. Law Jour., 3); Van Tuyl vs. Westchester Fire Ins. Co., 55 N. Y., 657; Cone vs. Niagara Fire Ins. Co., 60 N. Y., 619.

Where the occupation was given in the same form of words in the proofs of loss also; *Held*, that it was not false swearing with-

in the meaning of a provision in the policy, that any fraud or false swearing should forfeit all claims under it; nor are such proofs defective because the phrase does not correspond with the policy as reformed.

Maher vs. Hibernia Ins. Co., N. Y. C. A., 67 N. Y., 283; 6 Ins. Law Jour., 103.

10. A policy of insurance stating for what purposes the house in which the property insured is stored, is used, imports a warranty that the house is used for no other purpose. But when the insurance company seeks to avoid liability under the policy after a loss, on the ground of a breach of warranty on the part of the assured in using the house for other purposes than mentioned in the policy, the assured can, under proper pleadings, introduce parol evidence in avoidance of the plea of breach of warranty. The judgment is reversed because the court permitted the assured to introduce parol evidence in avoidance of the plea of breach of warranty without any pleadings to support the evidence; and the charge of the court without such pleadings, on the question of this plea, was erroneous. Notwithstanding the fact that the evidence was not objected to at the time, as the pleadings do not authorize the introduction of such evidence, the error will be reversed.

Texas Banking and Ins. Co. vs. Stone, Texas S.C., 49 Tex., 4; 8 Ins. Law Jour., 245.

See Cross Index for other cases bearing on **USE OR OCCUPATION.**

VACANT.

ABSTRACT OF THE LAW.

a. What constitutes vacancy, within the policy, largely depends upon the character of the risk and the language of the contract—the intention of the parties must be determined from the use of the premises and the incidents connected therewith. A practical occupancy consistent with such use, is all that is required.

Smith vs. Ins. Co., 32 N. Y., 399; Keith vs. Quincy Ins. Co., 10 Allen, 231; Paine vs. Agricultural Ins. Co., 5 N. Y., (S. C.), 619; Camwell vs. Merchants and Farmers' Ins. Co., 12 Cush. (Mass.), 167; Ashworth vs. Builders' Mutual F. Ins. Co., 112 Mass., 422; Cummins vs. Agricultural Ins. Co., 5 Hun. (N. Y.), 534.

b. Occupancy, when required by the contract, must be of a substantial character, and consistent with the use of the premises; it is not sufficient that the abandonment is not absolute, or that an occasional watch is kept.

Ashworth vs. Builders' etc. Ins. Co., *supra*; American Ins. Co. vs. Padfield, 78 Ill., 167; Chamberlain vs. Ins. Co., 55 N. H., 249; Keith vs. Quincy Ins. Co., 10 Allen, 231; Thayer vs. Agricultural Ins. Co., 5 Hun. (N. Y.), 556; Mead vs. Ins. Co., 7 N. Y., 530; Wall vs. Ins. Co., 7 N. Y., 370.

c. A mere description in the application as to occupancy, such as "to be occupied by a tenant," is not a warranty against future vacancy, nor does the term "dwelling" imply a present occupancy.

Hill vs. Hibernia Ins. Co., 10 Hun. (N. Y.), 26; Hough vs. City F. Ins. Co., 29 Conn., 10.

See further on this subject under POLICY, RISK, USE.

DIGEST OF RECENT CASES.

VACANT—WHAT IS WITHIN THE POLICY.

1. A policy of fire insurance provided that the same should become void if the building became vacant and unoccupied, and so remain without notice to the company, etc. The owner lived some distance away. A tenant whose lease had not expired, moved out, and the building remained unoccupied for seventeen days, when it was destroyed by fire. *Held*, that the policy was vitiated, and it was immaterial how the building came to be vacated.

Newton vs. City Fire Insurance Co., 15 Wis., 138; Harrison vs. City F. Insurance Co., 9 Allen, 231; Diehl vs. Adams Co. Insurance Co., 58 Pa. St., 443.

Dennison vs. Phoenix Ins. Co., Iowa S. C., 52 Iowa, 457; 9 Ins. Law Jour., 65.

2. The policy provided that it should be null and void "if without the written consent of the company first had and obtained, the dwelling-house or houses hereby insured become vacant by the removal of the owner or occupant, or cease to be occupied in the usual and ordinary manner that dwelling-houses are occupied." It was claimed that the premises were vacated without the knowledge of insured, who immediately upon learning of the fact sought to procure another tenant. *Held*, that where a condition in a policy of insurance is unambiguous and reasonable, non-compliance therewith by the insured will not be excused by

good faith on his part, or even by an honest but unsuccessful endeavor to fulfill the condition. The insured obtained his policy at a lower rate by reason of the stipulation and its violation forfeits the insurance.

Ins. Co. vs. Kroeger, 2 Norris, 64; *West. Ins. Co. vs. Croppen*, 8 Casey, 351; *Harrison vs. Ins. Co.*, 9 Allen, 231; *Keith vs. Ins. Co.*, 10 ib., 228; *Corrigan vs. Ins. Co.*, 122 Mass., 298. *Case of Gamwell vs. Ins. Co.*, 12 Cush., 167, distinguished.

McClure vs. Watertown F. Ins. Co., Pa. S. C., 9 *Ins. Law Jour.*, 209.

3. The policy was on a school-house, and provided that if it should become vacant and unoccupied without consent, the policy should be void. Afterwards its use for that purpose was abandoned and it was occupied as a dwelling. Subsequently it was vacated and remained vacant for several months preceding the fire. *Held*, that the utmost that could be accorded under the policy, would be a brief temporary vacancy such as is usual in school-houses. Neither as a dwelling nor a school, could it be allowed to be vacant during several months, and the policy was avoided.

American Ins. Co. vs. Foster, Ill. S. C., 92 Ill., 334; 9 *Ins. Law Jour.*, 268.

4. The policy provided that in case the property should become unoccupied, or be altered or repaired, etc., so long as it should remain unoccupied the policy should be of no force. The house had been vacated by previous tenants at least four days at the time it was burned, and was to be occupied by others as soon as certain repairs were made. *Held*, that instruction that the condition should have a liberal construction, and that a temporary vacancy for a reasonable time, during a change of tenants, did not avoid the policy, was erroneous. *Held*, that the language must be literally construed. The policy was not absolutely avoided, but rendered inoperative during periods of non-occupancy, whether long or short; such was the agreement of the parties.

Keith vs. Quincy etc. Co., 10 Allen, 228. Case distinguished of *Aurora etc. Co. vs. Kranich*, 36 Michigan R., 289.

Ætna Ins. Co. vs. Meyer, Ind. S. C., 63 Ind., 238; 8 *Ins. Law Jour.*, 249.

5. A policy of insurance upon a dwelling-house, contained a stipulation that if the premises should become unoccupied the policy should be void. In an action on the policy, it appeared that previous to the fire the assured left the house and went elsewhere to reside, taking part of her furniture with her and leaving the rest; that she left a man in possession, with instructions to sleep in the house at night; that this man quit the premises several days before the fire and did not return; and that no one was in the house when the fire occurred. *Held*, that the house was unoccupied within the meaning of the stipulation, and the policy was void.

Paine vs. Ag. Ins. Co., 5 N. Y. S. C. R., 619; 78 Ill., 169; *Ashworth vs. Builders' Ins. Co.*, 112 Mass.; *Keith vs. Quincy Mut. F. Ins. Co.*, 10 Allen, 228; *Whitney vs. Ins. Co.*, 9 How. P. N. Y.

Cook vs. Continental Ins. Co., Mo. S. C., 70 Mo., 610; 9 *Ins. Law Jour.*, 887.

6. Under a fire insurance policy requiring notice to be given if the insured premises became vacant, and the assured fails for six weeks to give such notice, it is inexcusable neglect, which will relieve the company from liability in case of loss by fire occurring within the period of the vacancy. Such notice must be given in a reasonable time. And it seems that a company would not be discharged from its obligation, if no notice is given of a temporary interruption of continuous possession incidental to a change of tenants.

Alston et al. vs. Old North State Ins. Co., N. C. S. C., 80 N. C., 326; 8 *Ins. Law Jour.*, 428.

7. The policy stipulated, "Warranted a family to live in said house throughout the year." *Held*, that the stipulation was an express warranty, and must be literally complied with, or the policy would be void.

Daniels vs. Hudson River Ins. Co., 12 Cush., 416; *Sayles vs. N. W. Ins. Co.*, 2 Curtis, 610.

Two workmen employed by plaintiff, slept in the house and took their meals elsewhere. *Held*, that this was not a compliance with the warranty. The workmen were merely watchmen, not a family within the meaning of the policy.

Poor vs. Humboldt Ins. Co., Mass. S. J. C., 125 Mass., 274; 7 *Ins. Law Jour.*, 874.

8. The New Hampshire statute, sec. 2, ch. 157, provides that no policy shall be avoided by reason of any mistake or misrepresentation, unless it shall appear to have been intentionally and fraudulently made. But the policy shall be reduced, on a showing of the facts, by as much as the premium ought to have been increased. *Held*, that this statute was intended to apply to mistakes in the making, not in the performance of contracts, and cannot relieve the insured against a breach in the performance, which was the result of his own neglect. Where the stipulation was that the policy should be void if the premises were vacated without immediate notice, the statute will not make a new contract and thus relieve from forfeiture where the premises had been vacated without notice.

Chamberlain vs. Ins. Co., 55 N. H., 249 (4 *Ins. Law Jour.*, 649), *excepted to*; *Jewell vs. Holderness*, 41 N. H., 161; *Shepherd vs. Ins. Co.*, 38 N. H., 232; *Pierce vs. Ins. Co.*, 50 N. H., 297.

Sleeper vs. New Hampshire F. Ins. Co., N. H. S. C., 50 N. H., 239; 5 *Ins. Law Jour.*, 537.

9. The tenant had removed some two months before, and was no longer occupying or paying rent for the house. He only held the key to deliver to the owner on his return. The owner had been notified of his removal and had requested him to lease it to some one else, but had afterward countermanded the order. There was a table, crib, and straw tick in the house, for which no ownership was claimed. *Held*, that the fair and reasonable construction of the policy clause "vacant and unoccupied," is that it should be without an occupant, without any person living in it; the language is not used in a technical, but in a popular sense. *Held*, that the house was vacant and unoccupied within the meaning of the policy. *Held*, that mere legal possession is not occupancy.

American Ins. Co. vs. Padfield et al., Ill. S. C., 78 Ill., 167; 4 *Ins. Law Jour.*, 893.

10. If a policy of insurance upon a house, provides that the policy shall be void, if the house "shall remain vacant or unoccupied for the space of ten days, without written notice to, and consent of the company," it is not erroneous to instruct the jury

that, if the house had not been used as a dwelling-place by some one within ten days of the loss, the policy would be void ; and that if the former occupant had moved with his family into another house where they slept and took meals, the fact that some of his furniture remained in the house, and the key had not been surrendered to the landlord until within the ten days, does not constitute an occupancy of the premises.

Corrigan vs. Connecticut Ins. Co., Mass. S. J. C., 122 Mass., 298.

WHAT IS NOT WITHIN THE POLICY.

11. The policy provided, in very small type, that if the premises became vacant, and so remained without notice and consent of the company, it should be void. The premises had been vacant for thirty-three days, without notice and consent, but the insured was all the time endeavoring to obtain a tenant. *Held*, that they did not remain unoccupied within the clear meaning of the policy.

Ins. Co. vs. Slaughter, 12 Wall. (U. S.), 404 ; 32 N. Y., 405, and cases cited. The cases of 9 Allen, 231 ; 10 Allen, 228 ; 15 Wis., 138, distinguished.

Kelley vs. Home Ins. Co., U. S. C. C., 5 Ins. Law Jour., 134.

12. The policy provided that if the house should become vacated by the removal of the owner or occupant, the policy should be void. *Held*, that the words refer to a permanent removal and entire abandonment of the house as a place of residence. The meaning is not identical with that of a clause, that if left unoccupied without giving immediate notice to the company the policy should be void.

Cases of *Paine vs. Agricultural Ins. Co.*, 5 N. Y. Supreme Court Reps., 619 ; *Wustum vs. City Ins. Co.*, 15 Wis., 138 ; *Harrison vs. City Ins. Co.*, 9 Allen, 231 ; *Keith vs. Quincy Ins. Co.*, 10 Allen, 228, distinguished.

Where there was evidence that the insured still retained the house as his place of residence, with the intention of returning after a temporary absence, it was a question for the jury whether the house had been vacated by the removal of the occupant. A statement in the proofs of loss as to the premises being vacant,

did not preclude the insured from showing the circumstances under which they became vacant.

Cummins vs. Agricultural Ins. Co., N. Y. C. A., 67 N. Y., 260; 6 Ins. Law Jour., 135.

13. Not sleeping at night in a dwelling occupied during the day, and in which the furniture is left, is not non-occupancy.

Hill vs. Hibernia Ins. Co., N. Y. S. C.

14. The insurance was on a summer residence from which the insured removed with his family in the fall, intending to return in the following spring, but all his furniture was left in the house, which was in charge of a person living near. The policy stipulated that it should be void if the premises should become "vacant and unoccupied." *Held*, that the language should be construed most favorably to the insured, and that in order to avoid the policy the premises must be both unoccupied through the absence of any person in charge, and vacant through their abandonment as a place of residence.

Hoffman vs. Ætna Ins. Co., 32 N. Y., 405; Rann vs. Home Life Ins. Co., 59 id., 387; Alston vs. Ins. Co., 80 N. C., 326; N. A. F. Ins. Co. vs. Zaenger, 63 Ill., 464; Am. Ins. Co. vs. Padfield, 78 Ill., 167.

Held, that the temporary removal of the owner, through a cessation of occupancy, was not a vacancy. *Held*, that such removal did not violate a general provision against an increase of risk.

Herrmann vs. Merchants' Ins. Co., N. Y. C. A., 81 N. Y., 184; 9 Ins. Law Jour., 658.

15. The conditions in a policy against vacancy and non-occupation, must be construed in view of the subject matter of insurance. Where the policy on a saw-mill provided that it should be void if the premises became vacant and unoccupied; *Held*, that delays and interruptions incident to the business, and involving its temporary discontinuance, were not within the contemplation of the parties. Where, through the breaking of machinery and other causes, work had at intervals been interrupted for several months, and no work had been done for sixteen days before the fire, but

the lumber was on hand to continue the business; *Held*, that the mill was not vacant within the meaning of the policy.

Whitney vs. Black River Ins. Co., N. Y. C. A., 72 N. Y., 108; 7 Ins. Law Jour., 477.

16. The policy provided "that if the insured premises shall become vacant or unoccupied, or the risk be increased in any manner within the control of the assured," etc. The plaintiff claims the building was occupied by a tenant, who had moved out, but left a portion of his furniture in the premises, and that he had moved out without the knowledge of the plaintiff; therefore the risk was increased, if at all, without his consent. *Held*, that the clause was ambiguous, and must be construed most strongly against the company. The plaintiff could recover, if the vacancy was not within his control.

North American Ins. Co. vs. Zaenger, 63 Ill., 465; Ins. Co. vs. Slaughter, 12 Wall., 404; Merrick vs. Germania Fire Ins. Co., 54 Penn., 277; Hoffman vs. Aetna Ins. Co., 32 N. Y., 413, and cases there cited.

Held, that the question was one of construction on the face of the policy, and parol testimony to show that the company never insured unoccupied property, was properly rejected. *Held*, that recitals in the policy are *prima facie* evidence of title.

Nicholls vs. Fayette Ins. Co., 1 Allen, 63; Fowler vs. U. S. Ins. Co., 23 Barb., 143.

Atlantic Ins. Co. vs. Manning, Col. S. C., 3 Col. R., 26; 7 Ins. Law Jour., 157.

17. A statement in the policy that the insured building was "occupied by a tenant for a boarding-house," was merely descriptive of its then existing condition, not a warranty that it would continue so occupied.

Blood vs. Howard Fire Ins. Co., 12 Cush., 472; Smith vs. Mechanics & Traders' Ins. Co., 32 N. Y., 399; Hough vs. City Fire Ins. Co., 29 Conn., 10.

The policy provided that if the premises should become vacant or unoccupied, it should be void. The building was no longer occupied as a boarding-house, but one of the rooms was furnished and occupied as a sleeping-room, by a person engaged in repairing the building, who ate elsewhere. *Held*, that the building was occupied, within the meaning of the policy. *Held*, that

a statement in the preliminary proofs, "that the building insured and destroyed was occupied by F. as a lodging-house, was a sufficient compliance with the requirement that the occupancy should be stated.

Hartford F. Ins. Co. vs. Smith & Doll, Col. S. C., 7 Ins. Law Jour., 140.

18. The building was described as a "ten tenement block frame." The policy provided that it should be void "whenever a building insured shall be unoccupied." *Held*, that the building was insured as a whole, and the occupation of a part of the tenements was occupancy within the meaning of the policy; there was nothing in the phrase "tenement block," to import that separate buildings were intended.

Keith vs. Quincy Ins. Co., 10 Allen, 228, and Ashworth vs. Builders' Ins. Co., 112 Mass., 442, distinguished.

Harrington vs. Fitchburg Mut. F. Ins. Co., Mass. S. J. C., 124 Mass., 126; 7 Ins. Law Jour., 618.

19. What constitutes vacancy in a dwelling, is a question of law; the existence of the vacancy is a question of fact. Where the premises had been leased to another who failed to take possession on account of the rain, and the family had left on the evening preceding, but the original owner continued during two days following to remain on the premises until late in the evening, and the property was burned a few hours later; *Held*, that when the intention of the owner is to remain until possession is given to another, the house will not be vacant although the family have left with no intention of returning, taking with them the furniture with exception of a bed, and the owner is not there at the time of the fire.

Amer. Ins. Co. vs. Padfield, 78 Ill., 167.

Phoenix Ins. Co. vs. Zucker, Ill. S. C., 92 Ill., 64; 9 Ins. Law Jour., 193.

20. In reply to the question in the application, "For what purpose used," it was answered "Dwelling." *Held*, that the answer was not descriptive of its present occupation or actual use, but simply of its class, and was not a warranty of actual occupancy.

Browning vs. Home Ins. of Columbus, 71 N. Y., 508; Cumberland Valley Mut. Protection Ins. Co. vs. Douglas, 58 Pa. St. R., 419; Van Schaick vs. Ni-

agara Fire Ins. Co., 68 N. Y., 434; Cone vs. Same, 3 T. & C., 33; 60 N. Y., 619. Distinguishing Ashworth vs. Builders' Ins. Co., 112 Mass., 422; Chase vs. Hamilton Ins. Co., 20 N. Y., 52; Alexander vs. Germania Ins. Co., 66 N. Y., 464; Walsh vs. Hartford Fire Ins. Co., 73 N. Y., 5.

Where the company was informed of the vacancy at the time the policy was issued, it cannot claim that the risk was never assumed. A temporary vacancy caused by parties moving out and others moving in, if not unreasonable in duration, is not a vacancy within the meaning of the policy. The question of its reasonableness is for the jury. Where it was assumed during the trial that the question of vacancy at the time of the fire was for the jury, and the court was requested to charge that if it was so vacant there could be no recovery, and a non-suit on the general ground of non-occupancy at different times had been denied, it cannot be alleged as error that the court should have held as matter of law that the policy was avoided by vacancy at the time of the fire. Where it appeared from the evidence, which was conflicting, that a part of the tenant's things still remained on the premises, the question of occupancy was properly left to the jury.

Woodruff vs. Imp. F. Ins. Co., N. Y. C. A., 10 Ins. Law Jour., 125.

21. Where a policy of insurance provided that it should become void if the house should become vacant and unoccupied, it was held that this language did not warrant a forfeiture when the occupants were temporarily absent on a visit, when there was no intent to abandon the house as a residence.

Stupetzki vs. Transatlantic F. Ins. Co., Mich. S. C., 9 Ins. Law Jour., 521.

22. A temporary non-occupancy of a dwelling during the period ordinarily required for a change of tenants, is not a vacancy which will avoid the policy, such vacancy must be the ordinary and usual condition for the time being. Whether such vacancy increased the risk, is a question of fact from the evidence.

Kirby vs. Phoenix Ins. Co., Shelby Co. (Tenn.) Circuit Court.

WHAT IS A WAIVER.

23. The agent understood when the policy was applied for, that the house was vacant and likely to remain so for some time.

Held, that this was knowledge of the company, and was in fact an oral contract, which justified a judgment below that the written consent required should be indorsed on the policy.

Cone vs. Niagara Fire Ins. Co., N. Y. C. A., 60 N. Y., 619: 4 Ins. Law Jour., 729.

24. The house was described in the policy as "the dwelling-house occupied by" the insured, and there was no stipulation against its becoming vacant. *Held*, that it was allowable for plaintiff to testify as to representations made to the agent that the house would be unoccupied during the summer. *Held*, that there was no warranty that it should remain occupied. *Held*, that the right of recovery was not forfeited through its having been unoccupied during the summer.

Liverpool, London, and Globe Ins. Co. vs. McGuire, Miss. S. C., 52 Miss., 227; 5 Ins. Law Jour., 851.

25. The policy provided that if the buildings became at any time unoccupied, liability should cease. *Held*, that where the agent had knowledge that they were vacant at the time of effecting the insurance, the insured would be entitled to recover, even if they remained vacant until the loss, in the absence of an agreement that they were afterward to be occupied.

Aurora F. & M. Ins. Co. vs. Kranich, Mich. S. C., 36 Mich., 289; 6 Ins. Law Jour., 676.

26. One of the printed "rules and regulations" appended to a fire insurance policy, provided, "If any building insured in this company shall be vacated by the owner or occupant, notice thereof shall be given to the secretary of said company prior thereto, stating the particulars of such vacation or removal, and the length of time said building or buildings are to remain unoccupied." The policy set out that the assured was insured "under the conditions and limitations contained in the accompanying articles;" *Held*, that such "rules and regulations" were accompanying articles within the meaning of the policy. The assured gave notice to the agent of the company, that the occupant would be absent for about four weeks, in a temporary employment for the plaintiff's hus-

band, and that the wife of the occupant would go with him on a visit; *Held*, that notice to the agent was notice to the company. The assured gave notice to the agent, that the occupant did not intend to move his things away from the dwelling-house insured, but he did remove the most of the household furniture and effects to a neighbor's, before he and his family went away on the temporary employment and visit. The dwelling-house was burned when unoccupied. *Held*, that a material condition of the contract was violated; that notice of the "particulars of such vacation or removal" had not been given, within the meaning of the policy. *Held*, that failure of the plaintiff to give notice of such particulars, was not a mistake within the meaning of sec. 2, ch. 157, Gen. Stats. of New Hampshire.

Sleeper vs. Ins. Co., 56 N. H., 401, overruling *Chamberlain vs. Ins. Co.*, 55 N. H., 249.

Hill vs. Equitable Mut. Fire Ins. Co., N. H. S. C., 6 *Ins. Law Jour.*, 314.

27. At the time of application, the agent agreed that the house might be vacated. The premium was paid, and a policy forwarded to the agent, who retained it for insured until after the loss. Contrary to agreement and unknown to the insured, the policy provided that it should be void if the property was vacated without consent indorsed. *Held*, that knowledge of the agent was notice to the company, and the assumption of the risk estopped it from setting up the policy condition as a defense.

Atlantic Ins. Co. vs. Wright, 22 Ill., 462.

Held, that the insured not having seen the policy, had a right to assume it corresponded with the agreement, and the company having failed to notify him of the change, was bound by the contract.

Case of Hartford Fire Ins. Co. vs. Webster, 69 Ill., 392, distinguished.

St. Paul F. & M. Ins. Co. vs. Wells, Ill. S. C., 86 Ill., 82; 7 *Ins. Law Jour.*, 912.

28. The policy stipulated that if the premises became unoccupied without the consent of the company indorsed, it should be void. The insured notified the local agent of the company, whose home office was in another State, that the tenant had vacated the

premises, and they had been rented to another tenant who was going in, and the agent replied, "It is all right." The premises remained vacant about three weeks, and until the time of the fire. The policy described the premises as "occupied by a tenant." *Held*, that the agent was authorized to waive the policy condition requiring the company's consent to be indorsed, and his notification and consent amounted to such waiver. The company must be presumed to know that the premises were liable to be vacated, and the time they remained unoccupied was not unreasonable.

Viele vs. Germania Ins. Co., 26 Iowa, 9; *Miner vs. Phoenix Ins. Co.*, 27 Wis., 699; *Gans vs. Phoenix Ins. Co.*, Wis. S. C.; *Devine vs. Home Ins. Co.*, 32 Wis., 476.

Palmer vs. St. Paul F. & M. Ins. Co., Wis. S. C., 44 Wis., 205; 7 *Ins. Law Jour.*, 667.

29. The policy on a summer hotel stipulated that a family should live in the hotel throughout the year. *Held*, that such occupancy is a question of fact and not of law. *Held*, that no specific number of persons is necessary to constitute a family, nor is it necessary that they should eat in the house where they live, nor that they should be employed in or about the house, nor is it material that they are hired; the precise question is, are they living under one head or management? *Held*, that two men employed by the owner as servants, sleeping at the hotel, but taking their meals elsewhere, was sufficient to justify a finding of occupancy within the meaning of the policy. *Held*, that a statement by the agent that he knew how the house was occupied, and was satisfied, was evidence of a waiver of stricter compliance with the policy condition.

Poor vs. Hudson Ins. Co., U. S. C. C. N. H., 9 *Ins. Law Jour.*, 428.

30. The policy stipulated that the consent of the company should be necessary to allow the premises to become or remain unoccupied. At the time of making the application, the agent agreed with the assured that the building might remain unoccupied for thirty days. *Held*, that the argument that the contract being partly written and partly parol is therefore invalid, will not

apply. Notice to the agent is notice to the company, and is binding on it.

Viele vs. Germania Ins. Co., 25 Iowa, 9; *Young vs. Hartford Ins. Co.*, 45 Iowa, 377; *Bartholomew vs. Merchants' Ins. Co.*, 25 Iowa, 507; *Altman vs. Phoenix Ins. Co.*, 27 id., 203; *Miller vs. Mutual Ins. Co.*, 31 id., 216; *Boecher vs. Hawkeye Ins. Co.*, 47 Iowa, 256.

Williams vs. Niagara Ins. Co., *Iowa S. C.*, 50 Iowa, 561; 9 *Ins. Law Jour.*, 38.

31. The policy provided that in case of vacancy without the written consent of the company first obtained it should be void. *Held*, that the agent who issued the policy, and had authority also to make surveys, consent to assignments, and attend to all other duties and business of the company, was authorized to give the required consent, and the fact that it was not indorsed by him until after the vacancy, was of no consequence.

Wheeler vs. Watertown Fire Ins. Co., *Mass. S. J. C.*, 10 *Ins. Law Jour.*, 354.

32. The policy insured against loss on building "occupied as dwelling, situate," etc. *Held*, that this statement was not necessary for identification, and could have been for no other purpose, than as a fact relating to the risk; it was therefore a warranty that the building was occupied.

Wall vs. East River Mutual Ins. Co., 7 N. Y., 370; 13 Conn., 544; *Parnelee vs. Hoffman Fire Ins. Co.*, 54 N. Y., 193.

The policy contained an agreement that any other person than the insured who may have procured the insurance, shall be deemed the agent of the insured. *Held*, that the validity of the warranty was not affected by any knowledge of the agent employed to solicit applications.

Chase vs. Hamilton Ins. Co., 20 N. Y., 52, 56; *Rohrbach vs. Germania Ins. Co.*, 4 *Ins. Law Jour.*, 737. *Case of Rowley vs. Empire Ins. Co.*, 20 N. Y., 550, distinguished.

Held, that where the house was unoccupied at the time of insuring, and so remained until the loss, with the knowledge of the agent, this was a breach of warranty.

Alexander vs. Germania Ins. Co., *N. Y. C. A.*, 66 N. Y., 464; 5 *Ins. Law Jour.*, 360.

33. The policy provided that if the building became unoccupied, it should be of no effect so long as the property remained in that condition. *Held*, that information to the agent, at the time of effecting the insurance by the insured, that she should leave the premises temporarily, did not waive the written contract afterwards accepted.

Ætna Ins. Co. vs. Burns, Ky. C. A., 5 Ins. Law Jour., 69.

34. The policy provided that it should be void if the property should remain unoccupied for more than fifteen days. It was claimed that the agent was informed, before the policy was issued, that it would remain vacant, and replied that it would make no difference. *Held*, that the written policy could not be varied by a prior parol promise; the case is not analogous to the subsequent waiver of a binding condition.

Peoria M. & F. Ins. Co. vs. Hall, 12 Mich. R., 20; Westchester Ins. Co. vs. Earle, 33 Mich. R., 144; North Amer. F. Ins. Co. vs. Throop, 22 Mich. R., 147; Aurora F. & M. Ins. Co. vs. Kranich, 25 Mich. R.

Hartford F. Ins. Co. vs. Davenport, Mich. S. C., 37 Mich., 609; 7 Ins. Law Jour., 228.

35. A policy of insurance upon a building burned, contained a provision that the company should not be liable for any loss while the building was vacant or unoccupied. At the time of informing the company of the loss, the insured told the secretary and adjuster that it was unoccupied. No objection was made upon that ground, but fuller information and proofs of loss were demanded, and, in answer to a request to adjust the loss, they replied that the adjuster would come up in a few days and examine into the matter. Upon the investigation he told the insured he did not know what the company would do, but directed him to send in the proofs of loss. The policy provided that immediate notice of loss should be given, and also a particular account of the origin and circumstances of the fire, the occupancy of the premises, etc., before the loss should be payable. *Held*, that as furnishing proofs of loss was a condition precedent to any right of action upon the policy, the requiring proofs did not estop defendant from claiming the

benefit of the forfeiture from the fact of the building being vacant.

Edgerly vs. Farm. Ins. Co., 43 Iowa, 587; *Dennison vs. Phoenix Ins. Co.*, 3 N. W. Rep., 90. Cases distinguished of *Webster vs. Phoenix Ins. Co.*, 36 Wis., 67, and *Northwestern Mut. Life Ins. Co. vs. Germania Fire Ins. Co.*, 40 Wis., 446.

Fitchpatrick vs. Hawkeye Ins. Co., Iowa S. C., 52 Iowa, 335; 9 *Ins. Law Jour.*, 499.

36. A continuing warranty in a policy of insurance, the breach of which (whether injurious to the insurer or not) avoids the policy, being in the nature of a forfeiture, must be construed as strongly against the insurer, and as favorably for the insured, as its terms will reasonably permit.

Lowe vs. Hyde, 39 Wis., 335; *Lyman vs. Babcock*, id., 503; *Morse vs. Ins. Co.*, 30 Wis., 534, 540; *Appleton Iron Co. vs. B. A. Ass. Co.*, 46 Wis., 23, 32; *Ins. Co. vs. Wright*, 1 Wall., 468; *Western Ins. Co. vs. Croppen*, 32 Pa. St., 351; *Hoffman vs. Ins. Co.*, 32 N. Y., 414; *Clinton vs. Ins. Co.*, 45 N. Y., 454, 461; *Livingston vs. Stickles*, 7 Hill, 235; *Cullen vs. Springfield Ins. Co.*, 2 Sum., 43, 44; *Breasted vs. Farmers' Loan & Trust Co.*, 4 Seld., 305; *Yeaton vs. Fry*, 5 Cranch, 341; *Nat. Bank vs. Ins. Co.*, 5 Otto (U. S.), 678; *Smith vs. Ins. Co.*, 32 N. Y., 399; *Boon vs. Aetna Ins. Co.*, 40 Conn., 586; *Schunck vs. G. W. & W. F.*, 44 Wis., 365.

A fire insurance policy declared that if the premises shall become vacant "without immediate notice to the company, and indorsement made on the policy," the contract of insurance shall become void. It then provided that the insurance "may also be terminated at any time at the option of the company, by giving a written notice to that effect to the insured," and that "in such case the assured shall be entitled to claim a ratable proportion of the premium," etc. *Held*, that the indorsement here mentioned cannot be construed to be an indorsement of the consent of the company to a continuance of the insurance during such vacancy, but merely of the fact that notice of the vacancy has been given. *Held*, that where such a notice has been promptly given, if the company would relieve itself from further liability on the policy, it must notify the insured of its option to do so, and return the unearned part of the premium. The want of such notice from the insurer to the insured is not waived or cured by knowledge

on the part of the assured that the insurer's agent had general instructions not to carry policies in such cases.

Wakefield vs. Orient Ins. Co., Wis. S. C., 10 Ins. Law Jour., 249.

CONSTRUCTION AS TO.

37. The policy provided that it should be void if the premises were vacated without notice and permission indorsed. The policy was taken out by C., the mortgagee, with consent of W., the owner, insuring W. and payable to C. The premiums were paid by C. The building was afterward vacated by W., who gave no notice, because ignorant of the condition. C. did not notify because he was ignorant of the removal. The building was not destroyed by any risk due to the non-occupation. *Held*, that the failure to notify was a "mistake" within the provision of the General Statutes of New Hampshire, ch. 157, sec. 2.

Ogden vs. Saunders, 12 Wheat., 259; Baldwin vs. Hale, 1 Black, 231; Sturgis vs. Crowningshield, 4 Wheat., 199.

But as the company might have refused the insurance or charged a higher premium had they known the circumstances, the amount of liability must be diminished as indicated by the statute.

Chamberlain vs. N. H. Ins. Co., N. H. S. C., 55 N. H., 249; 4 Ins. Law Jour., 649.

38. The description of the building insured, as a dwelling, is not a warranty that it is occupied as such in the absence of any policy provision to that effect. A provision in the policy that any omission to make known a fact material to the risk should render it void, is not violated by the failure of the insured to disclose the fact that it was unoccupied, in the absence of fraud, or of any special inquiry on that point.

Gates vs. Madison Mnt. Ins. Co., 5 N. Y., 475.

Browning vs. Home Ins. Co. of Columbus, N. Y. C. A., 7 Ins. Law Jour., 428.

39. The policy provided that if any change should occur in the title, condition, or occupancy, increasing the risk, the company must be notified and the policy canceled or an increased premium

paid ; but there was no provision that in case the property was vacant, it should be void. *Held*, that the policy was not avoided by leaving the premises unoccupied, unless it was done in bad faith.

Residence F. Ins. Co. vs. Hannawold, Mich. S. C., 37 Mich., 103 ; 7 Ins. Law Jour., 226.

40. The policy provided, that if the premises were vacant at the time of the fire, the policy should be void. The assured testified that his son was occupying the house, keeping bachelor's hall, and the son testified he occupied the house after his father moved, but was not at home the night of the fire. Two witnesses for defendant testified that they had seen no signs of life in the house for several weeks before the fire. The court reserved the question whether there was sufficient evidence that the house was unoccupied. The verdict was for plaintiff, and the court afterwards entered judgment for the defendant on the reserved point, *non obstante veredicto*. *Held*, that this was error ; that certainly there was a question of fact for the jury, and the court had no right to withdraw the case from them by such a reservation.

Chandler vs. Commerce Fire Ins. Co. of New York, Pa. S. C., 88 Penn., 224.

See Cross Index for other cases bearing on VACANT.

VALUATION.

ABSTRACT OF THE LAW.

a. An overvaluation, however excessive, will not forfeit the policy if made in good faith, unless the value is made a warranty. It is, however, evidence to be considered when fraud is alleged as a defense.

Ins. Co. of N. A. vs. McDowell, 50 Ill., 120 ; Catron vs. Tenn. Ins. Co., 6 Humph., 176 ; Protection Ins. Co. vs. Hall, 15 B. Mon. (Ky.), 411 ; Lee vs. Howard F. Ins. Co., 11 Cush. (Mass.), 324 ; Babbitt vs. L. L. & G. Ins. Co., 66 N. Ca., 70.

b. No proof of value is required under a valued policy. In the absence of fraud the value is that fixed by the contract, or, in case of partial loss, a proportionate part.

Wallace vs. Ins. Co., 2 La., 559 ; Lycoming Ins. Co. vs. Mitchell, 44 Penn. St., 367 ; Harris vs. Eagle Ins. Co., 5 Johns. (N. Y.), 368.

c. In case of loss, the question of value under an open policy, is usually one of fact, and the rule by which it is to be estimated, varies with the nature of the case. In the case of a building or other subject not having a ready market, the jury are at liberty to frame their own rule, provided it be fair. The cost of replacement, its worth to a stranger, deterioration, etc., are elements proper to be considered, but are not necessarily conclusive.

Brinley vs. Nat. Ins. Co., 11 Met. (Mass.), 195; *Niblo vs. N. A. Ins. Co.*, 1 Sandf. (N. Y.), 551; *Commonwealth Ins. Co. vs. Sennet*, 37 Penn. St., 205.

d. In the case of articles having a ready market, the market value at the time and place of loss, is generally the cash value, but a temporary depreciation in the market, which would unduly depress the normal value, should not be considered. Neither cost, profits, nor unpaid duties are necessary elements, unless the latter reduce the insurable interest, and in case of damaged goods, a fair sale at auction with knowledge of the insurers, furnishes a proper basis.

Equitable F. Ins. Co. vs. Quinn, 11 L. C., 170; *Hoffman vs. Aetna Ins. Co.*, 1 Rob. (N. Y.), 501; *McCraig vs. Ins. Co.*, 18 U. C. Q. B., 130; *Wolfe vs. Howard Ins. Co.*, 1 Sandf. (N. Y.), 424; *Hoffman vs. Ins. Co.*, 1 La. An., 216; *Henderson vs. Ins. Co.*, 40 Rob. (La.), 164.

See further on this subject under ADJUSTMENT, CONSIGNEES, FRAUD, MEASURE OF DAMAGES, POLICY, REPLACEMENT, VALUED POLICY.

DIGEST OF RECENT CASES.

VALUATION—HOW IT IS TO BE ESTIMATED.

1. Evidence of the value of property at a previous date, was admissible or not at the discretion of the court.

Haines vs. Republic F. Ins. Co., N. H. S. C., 2 Ins. Law Jour., 833.

2. The rental of a building at the time of its destruction, may be given in evidence as bearing upon the question of loss, but the rental two years prior thereto, is too remote to be of value for that purpose.

Atlantic Ins. Co. vs. Manning, Col. S. C., 3 Col. R., 224.

3. Where the insurance was made upon a written application that covenanted to be a full exposition of the facts in regard to the value, etc., of the risk, and no valuation was incorporated in the form or required by the company, it could not afterward in-

sist that the valuation was material, and introduce oral evidence to prove the value.

Hersey vs. Merrimac Co. Mutual Fire Ins. Co., 7 Foster (N. H.), 157, distinguished.

Certificates of valuation made by the directors of another insurance company, agreed to by the insured, as a basis of contract with them, are inadmissible against him. The opinion of one acquainted with building, is admissible to show the nature and quality of the building.

McGinness vs. Adriatic Mills, 116 Mass., 177.

The amount which the land sells for after the destruction of the buildings, is not competent evidence to prove the value of the buildings. The insurance was for \$1,000, with the contribution clause; there was insurance under a prior policy for \$2,200, without contribution, but both were under a statutory limitation that the companies might insure only three-fourths of the value. The jury instructed that the defendant should contribute 10-32 part of 3-4 of the actual loss, rendered a verdict including the whole amount of the insurance. *Held*, that the finding was that the whole insurance did not exceed three-fourths of the value, and it could not be alleged that the first policy covered the entire insurable interest. Had the verdict been for but \$500 it might be contended that the plaintiff under such a verdict would receive more than the value, as estimated on the basis of the instructions. An adjustment is not evidence of the value between any others than the parties to it.

Bardwell vs. Conway Mutual Fire Ins. Co., Mass. S. J. C., 118 Mass., 465; 6 Ins. Law Jour., 413.

4. By actual cash value of goods, is meant the money which the goods would have brought at the market price at the time of loss, and in the place where the loss occurred, considering their character, quality, and any other circumstances bearing on the question. An excessive claim will not avoid the policy, unless known to be so by the insured; it must have been made with fraudulent intent, which must be determined by the preponderance of evidence.

Mack & Co. vs. Lancashire F. Ins. Co. et al., U. S. C. C. Mo.; 9 Ins. Law Jour., 680.

5. The proposal for insurance on a horse was filled up by the agent and signed by the insured on an agreed value of £51, a condition of the policy being, that a veterinary surgeon's certificate of value should be sent, which was not done. The policy, dated the 18th, was sent from the office on the 27th. On the 20th the horse received an injury, of which notice was sent to the company by a surgeon, who then stated the value at £20, which sum was inserted in the policy. The policy also provided that it should be only liable for two-thirds of the value at, and immediately before death. The horse died from the injury subsequent to the 27th. *Held*, that the company having received the premium on £51, and having dated the policy before the accident, they were liable for two-thirds of that sum, regardless of the subsequent value.

Castle vs. Guardian Horse and Vehicle Assurance Ass., Maidstone, (Eng.) Circuit Ct.

EFFECT OF WHEN EXCESSIVE.

6. Overvaluation, if fraudulent, forfeits all claims.

Howell vs. Hartford F. Ins. Co., U. S. C. C., N. D. Ill., 3 Ins. Law Jour., 649.

7. Overvaluation is immaterial in an open policy, where the value at the time of loss is made the criterion.

Aurora F. Ins. Co. vs. Johnson, Ind. S. C., 3 Ins. Law Jour., 907.

8. Statements in the policy which should have been made by the agent, may be shown by parol. A misrepresentation must be material to work a forfeiture under the Ga. code. The original cost of building the house or the cost of its replacement, is not necessarily the cash value of the house destroyed.

Mobile F. Dept. Ins. Co. vs. Coleman and Callat, Ga. S. C., 58 Ga., 251.

9. The application stated that the valuation was made by the applicant, and agreed that it was true, so far as known to him, and so far as it was material to the risk. The valuation given was \$12,000, and the amount insured \$6,000. Sales before the fire

amounted to \$653, and the jury found the value of the remainder destroyed to be \$7,204. *Held*, that the actual valuation was \$7,857. *Held*, that the value of a stock of goods is not usually indicated by the purchase price. Such goods are often bought to sell at retail and at a profit. What may be expected to be obtained for them under such circumstances, may reasonably be considered their value. *Held*, that in the absence of evidence of fraudulent intention this was not such an overvaluation as would avoid the policy.

Franklin Fire Ins. Co. vs. Vaughan, U. S. S. C., 92 U. S., 516 ; 5 Ins. Law Jour., 782.

10. The policy provided that any overvaluation should render it void. *Held*, that in order to avoid the policy, the valuation must be so clearly excessive as not to be accounted for on the theory of the general disposition of property owners to put a favorable estimate on their property. There must be a clear mistake or willful intention to deceive. *Held*, that where the property does not command a ready market, the price which it would bring at a present cash sale, is not a fair criterion of value. *Held*, that property occupied by insured as a homestead, may be fairly valued by him at the cost it would require to replace it in its existing condition.

Germania F. Ins. Co. vs. Casteel, Ill. S. C., 7 Ins. Law Jour., 253.

11. Mere overvaluation by insured in his application for insurance, however gross, is not conclusively willful and fraudulent as a matter of law, but is a proper subject of consideration for the jury as evidence of fraud. If made in good faith, it is not a fraudulent overvaluation that will defeat the policy.

Franklin Ins. Co. vs. Vaughan, 2 Otto, 516.

Objections to extracts read from legal authorities in requested written instructions, are purely technical, and it must be shown conclusively that they were not incorporated in the manuscript. An impeached witness may be a competent witness to impeach the witness by whom he was impeached. The impeachment affects merely his credibility, and is for the jury to consider. A finding for the insured for only half the valuation, does not show

that there was, in the judgment of the jury, such an excessive valuation as must have been fraudulent. The finding must have been based on an honest overvaluation.

Citizens' F. & M. Ins. Co. vs. Short, Ind. S. C., 62 Ind., 316; 8 Ins. Law Jour., 126.

12. An overvaluation of the loss, made knowingly and with intent to defraud, defeats the claim. It is not necessary that the valuation should be arithmetically accurate, but there must be an honest effort to make it truthful.

Huchberger vs. Ins. Co., 5 Bissell, 106.

Sidney vs. St. Paul F. & M. Ins. Co., U. S. C. C. Ill., 8 Ins. Law Jour., 461.

13. In case of an erroneous statement of the value of the buildings to the agent of the company, by the agent of insured, under the Maine statutes, the question is, not whether the insurers regarded that matter as material to the risk, or were induced thereby to take the risk, but whether the jury are satisfied that the difference between the property as represented and as it really existed, contributed to the loss or materially increased the risk. Vacancy of the building, or any change in its use or occupation, will not affect the policy, unless the risk is thereby materially increased, which is for the jury. The evidence of insurance experts in such case, is not competent to show that insurance companies generally would not insure unoccupied buildings on account of the increased risk, or that a risk is regarded as greater or less, according to the amount of the insurance. A finding that the misrepresentation as to value contributed to the loss, or materially increased the risk, will avoid the policy, although the jury may not find that the representation was made with fraudulent intent.

Thayer vs. Prov. Wash. Ins. Co., Me. S. J. C., 70 Me., 531.

14. Every overvaluation will not avoid the contract. There must be some element of fraud or intention to deceive, with a view to obtain more insurance than could otherwise be secured.

Franklin Ins. Co. vs. Vaughan, 92 U. S. Reps., 519.

Planters' Ins. Co. vs. Myers, Miss. S. C., 55 Miss., 479; 7 Ins. Law Jour., 56.

15. The policy limited the amount that might be insured to three-fourths of the value. The property at the time of issuing the policy was valued at \$9,000; other insurance was permitted in the first application, and disclosed to the extent of \$3,000 in the renewal, the present insurance being also for \$3,000. It was admitted that the \$6,000 of insurance was more than three-fourths the actual value at time of loss. *Held*, that valuation is a matter of judgment, and if the value was fixed and the insurance made in good faith, the policy was valid.

Harrington vs. Fitchburg Mut. F. Ins. Co., Mass. S. J. C., 124 Mass., 126; 7 Ins. Law Jour., 618.

16. The policy provided that "any false representation by the assured, of the condition, situation, or occupancy of the property, or any omission to make known any fact material to the risk, or an overvaluation, or any misrepresentation whatever," should render it void. *Held*, that a substantial overvaluation, such as would not ordinarily arise from a difference of opinion, whether honestly or fraudulently made, avoided the policy, and a refusal to so charge, was error calling for reversal.

Smith vs. Bowditch Mut. Fire Ins. Co., 6 Cush., 443; Vose vs. Eagle Life and Health Ins. Co., 6 Cush., 42; Bennett vs. Mutual Fire Ins. Co., 7 Cush., 175; Wilbur vs. Bowditch Mut. Fire Ins. Co., 10 Cush., 446; Gould vs. York Co. Mut. Fire Ins. Co., 61 Me., 401; Carpenter vs. American Co., 1 Story, 57; Catron vs. Tennessee Co., 6 Humphreys, 176; Amazon Ins. Co. vs. Gilbert, 28 Mich., 429.

Case of Bonham vs. Iowa Cent. Ins. Co., 25 Iowa, 329, distinguished.

Boutelle vs. Westchester Fire Ins. Co., Vt. S. C., 7 Ins. Law Jour., 781.

17. The application was a warranty, and it was alleged that the valuation was fraudulently excessive. The insurance was on house and furniture in specific amounts; the house only was burned, the furniture having been removed. *Held*, that the company, by accepting an answer in the application which only set forth the aggregate value of all the property, indicated that no separate valuation was required, and that they considered a

policy clause limiting the liability to the cash value at the time of loss, a sufficient protection.

People vs. Jones, 24 Mich. R., 215; *Peoria Ins. Co. vs. Perkins*, 15 Mich. R., 380.

Residence F. Ins. Co. vs. Hannawold, Mich. S. C., 37 Mich., 103; 7 *Ins. Law Jour.*, 220.

18. An honest overvaluation, however gross, untainted by fraud, will not prevent recovery.

Parker vs. Amazon Ins. Co., 34 Wis., 364; *Ins. Co. vs. Weides*, 14 Wallace, 375; *Williams vs. Phoenix F. Ins. Co.*, 61 Me., 67; *Moore vs. Protection Ins. Co.*, 29 do., 97; *Franklin F. Ins. Co. vs. Updegraff*, 43 Pa. St., 350; *Marion vs. Great Republic Ins. Co. of St. Louis*, 85 Mo., 148; *Wood vs. Goodhue F. Ins. Co.*, 43 Barb., 400.

Dogge vs. N. W. Nat. Ins. Co., Wis. S. C., 49 Wis., 501; 9 *Ins. Law Jour.*, 574.

19. Mere overvaluation is not sufficient to establish fraud, unless it is so unreasonable as to indicate a purpose on the part of the applicant to defraud the company, by knowingly overestimating the value of the property. Excessive damages by the jury cannot be corrected after judgment has been entered, and the court has adjourned.

Continental Ins. Co. vs. Ware, Ky. C. A., 9 *Ins. Law Jour.*, 519.

20. Overvaluation of property in an application for insurance upon it, if such valuation be honestly given according to the applicant's judgment, does not defeat the right to recover for a loss; otherwise, if intentionally overvalued.

Miller et al. vs. Germania Ins. Co., Tioga Co. (Pa.) C. P., 6 *Ins. Law Jour.*, 873.

21. An unintentional overvaluation will not forfeit, though the application claims to contain a just, full, and true exposition of the facts, and is made part of the policy.

Nat. Bank vs. Ins. Co., U. S. S. C., 5 Otto, 673.

See Cross Index for other cases bearing on VALUATION.

VALUED POLICY.

ABSTRACT OF THE LAW.

a. In order to constitute a valued policy, it is necessary that not only the value of the property, but the amount of indemnity which may be claimed in case of loss, should be fixed by its terms. If a valid interest subsist, such a contract is generally unimpeachable except for fraud.

Lycoming Ins. Co. vs. Mitchell, 43 Penn. St., 847; *Cushman vs. N. W. Ins. Co.*, 36 Me., 487; *Harris vs. Eagle Ins. Co.*, 5 John. (N. Y.), 368.

b. An indorsement of a valued policy on another policy issued by a different insurer, does not render the latter valued.

Millaudon vs. West. M. F. Ins. Co., 9 La., 27.

See further on this subject under POLICY.

DIGEST OF RECENT CASES.

1. Refusal to nonsuit "because the value was not proven," is not error in the case of a valued policy, where the real ground was gross and excessive valuation. Where the transaction was *bona fide* and without fraud, the valuation, though excessive, is binding. Excessive valuation may be presumptive, but is not conclusive evidence of fraud.

Feise vs. Aguilar, 3 Taunt., 506; *Coolidge vs. Globe Mar. Ins. Co.*, 15 Mass., 341; *Alsop vs. Conn. Ins. Co.*, 1 Sumner, 451; *Case of High vs. De La Cour*, 3 Camp., 319, distinguished; *Lewis vs. Rucker*, 2 Burr., 1167-71; *Forbes vs. Aspinall*, 13 East., 313-328; *Gardner vs. Col. Ins. Co.*, 2 Cranch, C. C., 550.

A charge that the jury had a right to take only the fair market value at the port of shipment, and that the insured was bound to give all the information he had, and not perpetuate a fraud by false statement or concealment, was substantial compliance with a request to charge that the value insured is the value at the port of shipment, and the insured is bound in good faith to inform the underwriter of a substantially excessive valuation. A charge that fraudulent valuation is sufficient to avoid; that the policy valuation is conclusive, unless so excessive as to raise presumption

of fraud ; that a gross overvaluation is not of itself sufficient to avoid, but the jury have a right to infer from it fraud, is substantial compliance with a request to charge that fraudulent valuation avoids the policy, and fraud may be presumed from gross overvaluation. The statement of insured to broker that the valuation did not cover any profits, does not conclusively show that the value is represented as that of cost or value at the port of entry, and it would not be proper so to charge without qualification. In the case of bonds having some market value, a charge that the price when paid in them, is no fair criterion of value, is not an erroneous qualification of a request to charge that it is no criterion.

Sturm vs. Atlantic Mut. Ins. Co., N. Y. C. A., 63 N. Y., 78; 5 Ins. Law Jour., 209.

2. Under the Wisconsin law of 1874, providing that in case of total loss, the amount insured in the policy shall be taken as the value of the property and the measure of damage, it is not necessary to set out the actual cash value of the property in the complaint. A stipulation in the policy that a difference between the parties shall be submitted to arbitration, and that no action shall be brought until an award has been made, is inconsistent with the provisions of the statute and void. No arbitration or award is needed before instituting suit.

Reilly et al. vs. Franklin Ins. Co., 7 Ins. Law Jour., 391.

Thompson et al. vs. St. Louis Ins. Co., Wis. S. C., 43 Wis., 459; 7 Ins. Law Jour., 396.

3. In an action on a fire insurance policy, where the amount of loss was determined by ch. 347, Laws of 1874, to be the amount of insurance written in the policy; *Held*, that a party cannot complain of a judgment against him because the damages awarded are less than the opposite party was entitled by law to recover.

Reilly et al. vs. Franklin Ins. Co., 7 Ins. Law Jour., 391; White vs. Conn. Mut. Life Ins. Co., U. S. C. C., Cent. L. J., 1877; Case of F. & D. Ins. Co. vs. Curry, Ky. C. A., 10 Ch. L. N., vol. 10, p. 43, excepted to.

Held, that the insurer cannot defend on the ground that by the terms of the policy, "all fraud, or attempt at fraud, by false

swearing or otherwise," on the part of the assured, was to cause a forfeiture, and that the assured, upon his examination under oath before a notary as to the amount of the loss, grossly and falsely exaggerated the value of the property for the purpose of defrauding the insurer.

Bammessel vs. Brewers' F. Ins. Co., Wis. S. C., 43 Wis., 463 ; 7 Ins. Law Jour., 767.

See Cross Index for other cases bearing on VALUED POLICY.

VOYAGE.

ABSTRACT OF THE LAW.

a. The voyage and its termini, must be stated in a voyage policy, with sufficient clearness to indicate the intention of the parties.

Folsom vs. Merch. Mut. Ins. Co., 38 Me., 414; Cleveland vs. Union Ins. Co., 8 Mass., 308.

b. In the absence of usage or liberty, the voyage must be strictly pursued over the usual course, or that which is most direct and advantageous under the circumstances, without stopping at ports not in that course, or not justified by usage.

Kettell vs. Wiggin, 13 Mass., 68; Martin vs. Del. Ins. Co., 2 Wash. C. C., 254; Lockett vs. Merch. Ins. Co., 10 La., 339; Secomb vs. Prov. Ins. Co., 10 Allen, 303; Mallory vs. Com. Ins. Co., 9 Bosw., 101.

c. Liberty to touch at one port, will not justify the substitution of another, neither will it exclude by implication such ports as are customary in the course of a voyage.

Stevens vs. Com. Ins. Co., 6 Duer, 594; Child vs. Sun Ins. Co., 3 Sandf., 26.

d. The ports must be visited in their proper order, though all need not be visited under a liberty policy.

Robertson vs. Clarke, 1 Bing., 445; Andrews vs. Mellish, 5 Taunt., 496; Hale vs. Mer. Mar. Ins. Co., 6 Pick., 172.

e. The voyage does not generally terminate until the usual or expected place of unloading has been actually reached, though the vessel may be in the harbor.

Dickey vs. United Ins. Co., 11 Johns., 358; Gray vs. Gardner, 17 Mass., 188; Meigs vs. Ins. Co., 2 Cush., 439.

f. An actual and substantial departure will commence the voyage, though there be the subsequent necessary delay and detention in the harbor, but where the vessel merely breaks ground, the contrary.

Bowen vs. Hope Ins. Co., 20 Pick., 275; Ridsdale vs. Shedden, 4 Camp., 107; Moir vs. Roy. Ex. Ass. Co., 6 Taunt., 241.

DIGEST OF RECENT CASES.

1. The risk was to terminate at the place and time the voyage should be stopped in consequence of ice or the closing of navigation making its completion impossible; allowing three days for a discharge of cargo. *Held*, that the three days were to date from the actual stoppage of the voyage, and the master had the right to continue, notwithstanding it was obviously impossible to reach the ultimate destination on account of ice, and to continue to a proper port of discharge, notwithstanding obstructions. Where there was evidence tending to show that the vessel was stopped by ice for more than three days, some little distance from the wharf, where she finally sunk, and also conflicting evidence whether the master had given over the idea of further progress when detained; *Held*, that the question of stoppage of the voyage was for the jury. Where the fact depends upon conflicting evidence, or inference to be drawn from facts proved, it is for the jury.

Sherwood et al. vs. Mercantile Mut. Ins. Co., N. Y. C. A., 66 N. Y., 630; 5 Ins. Law Jour., 747.

See Cross Index for other cases bearing on VOYAGE.

WAIVER.

ABSTRACT OF THE LAW.

a. Any act on the part of the insurer or his authorized representative, which can fairly be construed as an intention to dispense with a strict compliance with the terms of the contract, or which excuses a breach on the part of the insured, will usually be regarded as a waiver, and such acts or conduct may be set up to estop the company from alleging the thing waived as a ground of defense.

Reynolds vs. Commercial F. Ins. Co., 47 N. Y., 559; Blake vs. Exchange Mutual Ins. Co., 12 Gray (Mass.), 265; Hall vs. People's Mutual Ins. Co., 6 Gray (Mass.), 185; Fuller vs. Boston F. Ins. Co., 4 Met. (Mass.), 206; North American Ins. Co. vs. Throop, 22 Mich., 146

b. Knowledge by the insurer or agent before consummation of the contract, will usually be deemed a waiver; so also will the assumption of responsibility by them for acts or statements nominally belonging to the insured.

Etna Live Stock Ins. Co. vs. Olmstead, 28 Mich., 246; *Rowell vs. Empire Ins. Co.*, 36 N. Y., 530; *Woodbury Savings Bank vs. Charter Oak Ins. Co.*, 31 Conn., 526; *McBride vs. Republic Ins. Co.*, 2 Ins. Law Jour., 270; *Merchants and Manufacturers' Ins. Co. vs. Curran*, 45 Mo., 142; *Heaton vs. Manhattan Ins. Co.*, 7 R. I., 502; *Nichols vs. Fayette F. Ins. Co.*, 1 Allen (Mass.), 63.

c. Conduct on the part of the insurers, which implicitly recognizes the validity of the policy, is a waiver of the breach if known.

Frost vs. Saratoga Mutual Ins. Co., 5 Denio, 155; *Hill vs. Union Mutual F. Ins. Co.*, 32 N. H., 205; *Keenan vs. Dubuque F. Ins. Co.*, 13 Iowa, 375; *Witherall vs. Marine Ins. Co.*, 49 Me., 200; *North Berwick Co. vs. Ins. Co.*, 52 Me., 336.

d. Ignorance of the facts, however, on the part of the insurer, or conduct not calculated under the circumstances to mislead the insured, will not usually operate as a waiver or estoppel.

Ayres vs. Hartford Ins. Co., 17 Iowa, 176; *Finley vs. Lycoming Co. Mutual F. Ins. Co.*, 30 Penn. St., 311; *Veile vs. Germania Ins. Co.*, 36 Iowa, 9; *Allen vs. Vermont Mutual Ins. Co.*, 12 Vt., 366.

e. Mere silence on the part of the insurer when it is not obliged to speak, or omission to do acts not necessary to a denial of its liability, will not amount to a waiver.

Spring Garden Mutual Ins. Co vs. Evans, 9 Md., 1; *Ayres vs. Hartford Ins. Co.*, *supra*; *De Silver vs. State Mutual F. Ins. Co.*, 38 Penn. St., 130.

f. A policy stipulation that its provisions can only be waived by consent indorsed thereon, does not apply to conditions to be performed subsequent to a loss.

Franklin F. Ins. Co. vs. Chicago Ice Co., 36 Md., 102.

See further on this subject under APPLICATION, AGENT, ALIENATION, INCUMBRANCE, NOTICE, POLICY, PREMIUM, PROOFS OF LOSS, RISK, TITLE.

DIGEST OF RECENT CASES.

1. The contract of insurance, being made voidable and not void by a failure to comply with the conditions precedent, at whatever stage of the contract such failure may occur, the doctrines of waiver and estoppel will be applicable unless there is something special in the circumstances to prevent their application.

Brockelbank vs. Sugren, 5 C. & P., 21.

Pechner vs. Phoenix Ins. Co., N. Y. C. A., 65 N. Y., 195; 4 Ins. Law Jour., 782.

2. Where the goods were removed from the building without previous consent obtained, but the local agent was subsequently notified, and asked to continue the insurance, and the company by not canceling the policy and returning the unearned premium, failed to indicate a determination to treat the insurance as void; *Held*, that there were facts sufficient to justify a finding that the company was liable. The removal would give the company, on being informed, a right to cancel, and if no notice of removal were given the policy would cease to be binding, and no action could be maintained on it. But the company may waive its privilege, and where such waiver appears, the company will be estopped from insisting upon that which is inconsistent therewith.

New England F. and M. Ins. Co. vs. Wetmore, 32 Ill., 221; Ill. Mutual Ins. Co. vs. Stanton, 57 Ill., 354.

A refusal to pay the loss on the distinct ground of non-liability in any event, is a waiver of any objection as to the sufficiency of the proofs of loss.

Peoria M. and F. Ins. Co. vs. Whitehill, 25 Ill., 470.

Such a refusal is also a waiver of compliance with the requirement of the limitation clause.

Ætna Ins. Co. vs. Maguire, 57 Ill., 342.

Williamsburg City Fire Ins. Co. vs. Carey, Ill. S. C., 83 Ill., 453; 6 Ins. Law Jour., 493.

3. Receiving preliminary proofs without objection, and failure to object after a reasonable time, or refusal to pay on other grounds, is evidence of a waiver of the time of furnishing the preliminary proofs, and of defects therein. The policy provided that "if the policy is made payable to a third party, or is held as collateral security, the proof of loss shall be made by the party originally insured," and that "the loss shall be paid sixty days after due notice and proofs of the same by the assured, shall have been received." *Held*, that the proofs must be made by and in the name of the assured, though the whole insurance money is due the person to whom the loss is made payable, and the sixty days will be reckoned from the delivery of such proofs. A denial of all liability, and refusal to pay under any circumstances, is a

waiver of the sixty days clause, and an action may thereupon be commenced at once. The plaintiff will be entitled to the benefit of such waiver, although, if he had delayed sixty days after such refusal, the action would have been barred by the limitation clause in the policy. Conditions in a policy with respect to the remedy of the insured on the policy, are to be construed strictly. Under a condition that "the assured, if required, shall submit himself to an examination under oath," mere informal conversations or declarations by the officers of the company that they desire to have such examination, will not impose that duty on the insured. The demand for an examination must be made with such clearness and distinctness that the party shall be fully informed that the company mean to insist upon having it.

State Ins. Co. vs. Maackens, N. J. C. E., 38 N. J., 564.

See Cross Index for other cases bearing on WAIVER.

WAR.

DIGEST OF RECENT CASES.

1. Insurance companies chartered by the Southern *de facto* governments while in a state of rebellion, have a legal existence.

U. S. vs. Home Ins. Co. et al., U. S. S. C.

2. Four days after the provisional passage of the ordinance of secession by the convention of Virginia, and prior to its ratification by the people, or to any act of open hostility, or the president's proclamation of blockade, the United States forces fired the navy yard at Gosport, which fire by continuous spread destroyed the property of insured. *Held*, that the proximate cause of loss was the act of the U. S. forces. *Held*, that the fire did not take place "by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped powers," within the meaning of the policy. *Held*, that where the policy in general terms

agrees to make good all loss, from whatever source, but afterwards specially excepts losses from such cause, the burden of proof is on the insurer to show that the cause was within the exception. *Held*, that interest was allowable during the war.

Citing *Ins. Co. of Alexandria vs. Lawrence*, 10 Peters, 517; *Pelly vs. Roy. Exch. Ass. Co.*, 1 Burr., 347; *Ins. Co. vs. Tweed*, 7 Wall., 44-52; *Milwaukee, etc., Railway Co. vs. Kellogg*, 94 U. S. R. (4 Otto), 469; *Ins. Co. vs. Transportation Co.*, 12 Wall., 199; *Ins. Co. vs. Seever*, 19 Wall., 542; *Ins. Co. vs. Boon*, 95 U. S. R., 5 (Otto), 117; *Harris vs. York Mut. Ins. Co.*, 50 Penn., 341; *Langedale vs. Mason*, 1 Bennett's Fire Ins. Cas., 16; *Spruill vs. North Car. Mut. Life Ins. Co.*, 1 Jones, 126; *Robert's Adm'r vs. Cocke et al.*, 23 Gratt., 207, 219; *Protector*, 12 Wall., 700; *Adger vs. Alston*, 15 Wall., 555; *Brown vs. Hiatts*, *id.*, 117.

Portsmouth Ins. Co. vs. Reynolds, Va. S. C. A., 9 *Ins. Law Jour.*, 606.

3. By the charter, entered into on February 17th, the ship (after completing a previous voyage) was to go to Galatz for orders to load there, or at Braila or Ismail, and there load a cargo of grain, and then go to Malta for orders, with a memorandum, "in the event of war, blockade, or prohibition of export preventing loading, this charter to be canceled." A few days after the charter, the shipowner effected the policy of insurance to insure him the freight, the policy being for a year "at all times and in all places," the perils insured against being among others, "restraints of Princes," and the interest insured being described as "owner's freight at risk on board the ship or chartered when in ballast." On April 24th, 1877, Russia declared war against Turkey, and on April 30th the Queen issued a proclamation of neutrality. On May 1st, the ship sailed from the Tyne for Genoa with a cargo of coal, and arrived at Genoa on May 14th, and after discharging cargo, took in ballast for the voyage to Galatz. Before, however, the ship arrived at Genoa, the shipowner found that Russia had closed the ports mentioned in the charter, and then desired the charterer to cancel the charter, which he declined to do, and, thereupon, the ship sailed from Genoa in ballast for Constantinople, to fulfill the charter-party, and on May 28th the ship arrived there, when it was found that the loading ports were still closed, and that there was no reasonable probability of their being open in time for the ship to load

the chartered cargo. She, therefore, did not proceed further towards Galatz, but obtained at Constantinople a homeward cargo for England, the freight of which was less than the freight she would have earned had she obtained the chartered cargo. The shipowner then sued upon the policy to recover the difference lost, and the question submitted to the Court was whether the charter-party came to an end on the closing of the ports, or before the ship sailed from Genoa in ballast. *Held*, that it did so come to an end, and the Company was not liable.

Adamson vs. New Castle Steamship Ins. Ass., Eng. Q. B., 48 L. J. R. N. S., 670.

See Cross Index for other cases bearing on WAR.

WAREHOUSEMEN.

DIGEST OF RECENT CASES.

1. The policy was taken out by warehousekeepers "on merchandise, their own, or held by them in trust, or in which they have an interest or liability, contained in" a designated warehouse. *Held*, that there was latent ambiguity in this description, and the intention of the parties must be gathered from the policy alone.

Loraine vs. Tomlinson, Douglas, 564; Astor vs. Union Ins. Co., 7 Cowen, 202; Murray vs. Hatch, 6 Mass., 465; Levy vs. Merrill, 4 Greenl., 480; Balt. Fire Ins. Co. vs. Loney, 20 Md., 36. Case of Finney vs. Bedford Ins. Co., 8 Metcalf, 348, distinguished.

Held, that the policy covered the merchandise itself, and not merely the interest or claim of the warehousekeeper. Wharfingers, warehousemen, and commission merchants, having goods in their possession, may insure them in their own names, and in case of loss may recover the full amount of insurance for the satisfaction of their own claims first and hold the residue for the owners.

Waters vs. The Monarch Ins. Co., 5 Ellis and Blackburn, 870; London and Northwestern R. R. Co. vs. Glyn, 1 Ellis and Ellis, 2 B., 652; De Forrest vs. Fulton Ins. Co., 1 Hall, 133; Siter vs. Moritz, 13 Penn. State, 219.

Goods described in a policy as "merchandise held in trust" by warehousemen, are goods held not in the technical sense as trustees, but intrusted to them for keeping. The phrase "held in trust," must be understood in its mercantile sense.

Waters vs. Monarch Ins. Co., supra; *London and Northwestern R. R. Co., supra*.

A provision in the warehouse charter requiring that the receipts should contain a notice that the property was held by the corporation as bailees only, and was not insured by the corporation, does not affect the right of the corporation to insure, nor the construction of the policy. Depositors of the merchandise who received advances thereon from the warehousemen, took out other policies covering the same goods. *Held*, that the several policies constituted double insurance, and must contribute *pro rata*.

Horne Ins. Co. vs. Baltimore Warehouse Co., U. S. S. C., 3 Otto, 527; *6 Ins. Law Jour., 39*.

See Cross Index for other cases bearing on WAREHOUSEMEN.

WARRANTY.

ABSTRACT OF THE LAW.

a. A warranty is a condition precedent, and must be strictly and literally fulfilled, whether material or not; the statements must be absolutely true in all substantial respects.

Canada vs. St. Lawrence Co. Mutual Ins. Co., 10 Barb., 286; *Ward vs. Ins. Co., 14 Barb., 385*; *Lycoming Ins. Co. vs. Mitchell, 12 Wr., 367*; *Tibbets vs. Hamilton Mutual Ins. Co., 1 Allen, 305*; *Forbush vs. Massachusetts Ins. Co., 4 Gray (Mass.), 387*; *Miles vs. Ins. Co., 3 Gray (Mass.), 590*.

b. A representation, when inserted in the policy, or referred to by it, as part thereof, and the basis of the contract, becomes a warranty, but a mere reference in the policy will not convert a representation into a warranty, unless such be the manifest intention of the parties.

Ripley vs. Aetna Ins. Co., 30 N. Y., 136; *Williams vs. Ins. Co., 31 Me., 219*; *Aetna Ins. Co. vs. Grube, 6 Minn., 82*; *Snyder vs. Farmers' Ins. Co., 13 Wend., 92*; *Stebbins vs. Globe Ins. Co., 2 Hall, 632*; *Burritt vs. Saratoga Co. Ins. Co., 5 Hill, 188*; *Com. Ins. Co. vs. Monninger, 18 Ind., 352*; *Leroy vs. Market F. Ins. Co., 39 N. Y., 90*; *French vs. Chenango Ins. Co., 7 Hill, 122*; *Sheldon vs. Hartford Ins. Co., 32 Conn., 235*; *Cumberland Valley Mutual Protection Co. vs. Mitchell, 12 Wr., 374*.

c. A warranty however, must be construed strictly against the insured, and not extended by implication to anything not necessarily involved.

Turley vs. Ins. Co., 23 Wend., 374; *Peoria M. and F. Ins. Co. vs. Lewis*, 18 Ill., 553; *Sayles vs. North Western Ins. Co.*, 2 Curtis, 610.

d. Whether the warranty shall be construed simply as existing at the time, or as continuing, must be determined from its character and relations to the risk, as well as the language used, and such construction will be given as would most reasonably suggest itself to the insured under the circumstances of the case.

State Mutual Ins. Co. vs. Arthur, 6 Casey, 815; *Aurora F. Ins. Co. vs. Eddy*, 55 Ill., 218; *Schmidt vs. Peoria Ins. Co.*, 41 Ill., 295; *Frisbie vs. Fayette Mutual Ins. Co.*, 8 Casey, 325.

e. Applications and surveys, though referred to in the contract, are not to be deemed warranties, if they are treated simply as representations.

Wilson vs. Conway Ins. Co., 12 R. I., 148; *Catlin vs. Springfield F. Ins. Co.*, 1 Sum., 435; *Garcelon vs. Hampden F. Ins. Co.*, 50 Me., 580; *Houghton vs. Ins. Co.*, 8 Mich., 114.

f. In the case of Mutual Companies, the charter and by-laws, when the contract is made subject to them, become a part thereof, and are warranties, though not incorporated in the body of the instrument.

Holmes vs. Charleston Ins. Co., 40 Met., 211; *Marshall vs. Columbia Mutual F. Ins. Co.*, 7 Foster, 157; *Hygum vs. Aetna Ins. Co.*, 11 Iowa, 21; *Shepherd vs. Union Mutual Ins. Co.*, 38 N. H., 232.

See further on this subject under APPLICATION, INCUMBRANCE, POLICY, REPRESENTATION, TITLE.

DIGEST OF RECENT CASES.

WARRANTY—WHAT IS A VIOLATION.

1. The nature of the insured's interest was not expressed as required in the policy. The policy was "on his two buildings." The policy made the application a warranty. The application stated that plaintiff had disclosed all the facts. To the question as to the nature and amount of his interest, he replied "his deceased wife held the deed," which was true, but his actual interest was as general creditor of the estate, in virtue of an instrument executed to him by his wife before her death. *Held*, that this was a breach of the warranty which avoided the policy.

Chaffee vs. Ins. Co., 18 N. Y., 376; *Brice vs. Lorillard Ins. Co.*, 55 N. Y., 240.

Rohrbach vs. Germania Fire Ins. Co., N. Y. C. A., 62 N. Y., 47; 4 *Ins. Law Jour.*, 737.

2. A collateral representation must be fraudulent to avoid the policy, but a warranty need simply be untrue.

Deweese vs. Manhattan Ins. Co., 5 Vroom, 247.

Proof that the agent of the insurer had knowledge of the true state and condition of the premises, is a complete answer to alleged false and fraudulent representation.

Marshall vs. Mutual Fire Ins. Co., 7 Foster, 157; *Hartford Protec. Co. vs. Harmer*, 2 Ohio State R., 643; *Patten vs. Ins. Co.*, 40 N. H., 375; *State Mutual Ins. Co. vs. Arthur*, 6 Casey, 315.

Where the insurer defends on the ground of a breach of warranty, it is no answer that he knew that such warranty was not in fact true.

Columbia Ins. Co. vs. Cooper, 50 Penn. St., 331; *Smith vs. Cash Mutual Ins. Co.*, 24 Penn. St. R., 320.

Evidence of the knowledge of agent is inadmissible, even though he may have filled out the policy.

Citing and discussing *Lœhner vs. Home Mutual Ins. Co.*, 17 Missouri, 247; *Hough vs. City Fire Ins. Co.*, 29 Conn., 10; *Barrett vs. Union Mutual Ins. Co.*, 7 Cush., 175; *Lowell vs. Middlesex Ins. Co.*, 8 id., 127; *Jenkins vs. Quincy Mutual Ins. Co.*, 7 Gray, 370; *Jennings vs. Chenango County Ins. Co.*, 2 Denio, 75; *Rohrbach vs. Germania Ins. Co.*, 62 N. Y., 47; *Columbia Ins. Co. vs. Cooper*, 5 Penn. St., 331; *Sheldon vs. Hartford Fire Ins. Co.*, 22 Conn., 235; *Glendale Woolen Co. vs. Protection Ins. Co.*, 21 Conn., 19-37; *Vandervoort vs. Columbian Ins. Co.*, 2 Caines, 155; *Van Schaick vs. Niagara Falls Ins. Co.*, 68 N. Y., 438; *Maher vs. Hibernia Ins. Co.*, 67 N. Y., 283; *Ins. Co. vs. Lyman*, 15 Wall., 664; *Ins. Co. vs. Mowry*, 96 U. S., 544; *Ins. Co. vs. Wilkinson*, 13 Wall., 222; *Combs vs. Hannibal Ins. Co.*, 43 Missouri, 188; *Peck vs. N. L. Mutual Ins. Co.*, 22 Conn., 575; *Bevin vs. Conn. Mutual Ins. Co.*, 24 Conn., 244; *Beebe vs. Hartford Co. Mutual Ins. Co.*, 25 Conn., 51; *Hough vs. City Fire Ins. Co.*, 29 Conn., 10; *Woodbury Savings Bank vs. Charter Oak Ins. Co.*, 31 Conn., 519.

Franklin F. Ins. Co. vs. Martin, N. J. S. C. E., 40 N. J., 568; 8 *Ins. Law Jour.*, 134.

WHAT IS NOT A VIOLATION.

3. Where plaintiff made no representation as to his interest further than to show the agent the instrument by virtue of which he claimed an interest; *Held*, that the policy phrase, "on his two buildings," even if more than a mere description, was not a phrase for which the insured was in any way responsible. Plaintiff in his notice of loss stated his ownership as that of "legal heir of his deceased wife;" he was in reality a general creditor of her estate, by virtue of an instrument executed by her before her decease.

Held, that this was no intentional deception, or anything calculated to mislead.

Rohrbach vs. Aetna Ins. Co., N. Y. C. A., 4 Ins. Law Jour., 749.

4. A strict literal compliance with conditions subsequent, or promissory warranties, is not always possible. They must not be inconsistent with the due and customary use and enjoyment of the property, and must receive a reasonable construction, unless they are expressed in such clear and unambiguous terms as to amount to conditions precedent. Affirmative warranties are usually positive representations in the policy of the existence of some state of things at the time, or previous to the time of making the policy, and unless they are true, whether material to the risk or not, the policy is vitiated. The insured is held only to a substantial compliance with a condition precedent, as this cannot be extended by construction to include what is not necessarily implied in its terms.

Newcastle vs. McMorran, 3 Dow. Parl. Cas., 262; *Biscard vs. Shepherd*, 12 Moore P. C., 475; *Houghton vs. Fire Ins. Co.*, 8 Met., 125; *Fire Ins. Co. vs. Eddy*, 49 Ill., 106; *Daniels vs. Hudson R. Ins. Co.*, 12 Cush., 416; *Paul vs. People's Ins. Co.*, 6 Gray, 185; *Columbian Ins. Co. vs. Lawrence*, 2 Pet., 23; *Gilliat vs. Ins. Co.*, 8 R. I., 292; *Turley vs. North Am. Ins. Co.*, 25 Wend., 374; *Mayal vs. Mitford*, 6 Ad. & Ell., 670; *Shaw vs. Robberds*, 6 ib., 75; *Whitehead vs. Price*, 2 C. M. & R., 447.

James vs. Lycoming Ins. Co., U. S. C. C., 4 Ins. Law Jour., 9.

5. The application covenanted that it was a full description and a warranty, which should form the basis of the policy. Following the description in the policy were these words: "For a more particular description, and as forming a part of this policy, by which the assured is to be bound, special reference being had to the assured application and survey." In an anterior part of the policy was the declaration that the property is insured subject to the conditions and stipulations indorsed thereon, which constitute the basis of this insurance. One of the stipulations referred to on the back of the policy, provides that the application is the basis of the contract, and if it does not truly describe the property, the policy shall be void; and any false statements or

misrepresentations of facts material to the risk, shall be deemed fraudulent, and be an absolute avoidance.

Held, that a warranty extends to every matter that it embraces, whether material or not, and must be literally true. Representations are collateral to the contract and do not affect it if they are not willful or material. Statements on the face of the policy are *prima facie*, but not necessarily warranties; their character must be gathered from the form of expression, their purpose and relations. Warranties will not be created or extended by construction.

Daniels vs. Ins. Co., 12 Cush., 416; Miller's case, 31 Iowa, 226; Fornish's case, 4 Gray, 337, 340.

Statements in the application are usually representations unless made warranties by a reference in the policy, and a manifest purpose that the whole shall form one contract.

Campbell's case, 98 Mass., 391; Snyder's case, 13 Wend., 92.

Held, that the warranty was qualified and restricted to facts material to the risk, and the insured was bound by his statements as representations only, not as warranties.

Lindsay vs. U. M. Ins. Co., 3 R. I., 157; Fowkes vs. M. & L. Life Ass. Co., 8 Law Jour. (N. S.), 309.

Planters' Ins. Co. vs. Myers, Miss. S. C., 55 Miss., 479; 7 Ins. Law Jour., 56.

6. Insured applied to a broker to procure insurance. The broker wrote out a plan and description of the building after examination. Two years after, he applied for this insurance and used this paper in part and memory in part in answering questions about the risk. The president of the defendant said he would take the risk if he would send him a copy of the plan and what he had told him. The broker sent simply a copy of the written plan and description. The policy insured the premises "as per plan," etc., "a copy of which is filed," etc., and stipulated that "the application, survey, plan or description of the property herein insured, referred to in this policy, shall be considered a part of the contract and a warranty by the assured during the time this policy is kept in force;" also that the policy should be void in case of any false representations of the condition or occupancy of

the property, or omission to make known every fact material to the risk, or any occupancy or use of the premises which would increase the risk or such increase by any means within the power of the insured, or running over-time or at night without consent. or if the premises should become unoccupied without consent. The written description stated that there was a watchman day and night. The broker also stated orally that there was a force pump in working condition. At the time of the fire, manufacturing had been stopped for some days, and the pump, which worked by steam power, had been broken about three months, the hands had been discharged and the watchman discontinued, but the superintendent and one hand daily visited the premises to deliver stock which was not however in the insured building. *Held*, that plan, survey and application mean substantially the same thing, and if there had been a written application it would have been a continuing warranty, but the application in this case was oral, the plan was a mere memorandum copy, which the reference in the policy could not convert into an application.

Glendale Mfg. Co. vs. Protection Ins. Co., 21 Conn., 19; Sheldon vs. Hartford F. Ins. Co., 22 Conn., 205; May vs. Buckeye Mut. Ins. Co., 25 Wis., 291; First Nat. Bank vs. Ins. Co. N. A., 50 N. Y., 45; Garcelon vs. Hampden F. Ins. Co., 50 Me., 580.

The true construction of the policy is, that agreement to insure is not according to the plan but according to the policy, and what was insured was the building shown in the plan. *Held*, that a force pump shown in the plan, was not a warranty that it should be kept in working order. *Held*, that whether a statement is to be regarded as a continuing warranty, must depend largely on whether it is important to the character of the risk. *Held*, that an oral application cannot be construed into a continuing warranty when the contract is in writing.

Clark vs. Manfrs' Ins. Co., 5 How., 235; Ripley vs. Ætna Ins. Co., 30 N. Y., 136; Abbott vs. Shawmut Mut. F. Ins. Co., 3 Allen, 213; Schmidt vs. Peoria Mut. Ins. Co., 41 Ill., 295; Higginson vs. Dall, 13 Mass., 96; Kimball vs. Ætna Ins. Co., 9 Allen, 540.

Held, that where the change in the risk is single in its character, it is proper to estimate whether on the whole there has been an increase or diminution, but where several disconnected changes

have been made a diminution in one case may not be offset against an increase in another.

Curry vs. Com. Ins. Co., 10 Pick., 535; *Jones Mfg Co. vs. Manf. Ins. Co.*, 8 Cush., 82; *Date vs. Gore Dist. Mut. Co.*, 15 U. C. (C. P.), 175; *Heneker vs. Brit. Am. Ass'n*, 13 U. C. (C. P.), 99; *Lomas vs. Brit. Ass'n*, 22 U. C., 310.

Held, that in this case it was proper to consider whether the diminution of risk from the stoppage of the mill, did not offset the increase from the discharge of the watchman and stoppage of the pump. *Held*, that mere temporary neglect about repairing the pump, was not an increase of risk within the meaning of the policy, but a negligence insured against.

Dobson vs. Sotheby, Moody & M., 86; *Shaw vs. Robberds*, 6 A. & E., 75; *Gates vs. Madison County Ins. Co.*, 5 N. Y., 469; *Loud vs. Citizens' Mut. Ins. Co.*, 2 Gray, 221; *Gamwell vs. Merchants' Ins. Co.*, 12 Cush., 167.

Held, that the premises were not unoccupied within the meaning of the policy.

Albion Lead Works vs. Williamsburgh City F. Ins. Co., 17 S. C. C. Mass., 9 Ins. Law Jour., 435.

See Cross Index for other cases bearing on WARRANTY.

WATCHMAN.

ABSTRACT OF THE LAW.

a. Stipulations regarding watchmen are usually of the nature of continuing warranties, whose violation during the life of the policy, will work a forfeiture.

Ripley vs. Aetna Ins. Co., 24 Barb. (N. Y.), 552; *May vs. Buckeye Mutual Ins. Co.*, 23 Wis., 291; *Prieger vs. Ins. Co.*, 6 Wis., 89.

b. Such stipulations are to be construed according to the usages of the business, and the precise terms employed, in determining the sufficiency and period of the supervision required.

Glendale Woolen Co. vs. Protection Ins. Co., 21 Conn., 19; *Crocker vs. People's Ins. Co.*, 8 Cush. (Mass.), 79; *May vs. Buckeye Mutual Ins. Co.*, *supra*; *Ripley vs. Aetna Ins. Co.*, *supra*.

c. A stipulation that a watchman shall be kept, is not violated by the mere accidental or temporary absence of the watchman, but otherwise if it be expressly agreed that he shall be present at all times. It is sufficient if he be

present at such times, or during such period, as his supervision might reasonably be required, unless otherwise expressly stipulated.

Crocker vs. People's Mutual F. Ins. Co., 8 Cush. (Mass.), 79; Parker vs. Bridgeport Ins. Co., 10 Gray (Mass.), 30; Hovey vs. American Ins. Co., 2 Duer (N. Y.), 534; First National Bank of Ballston vs. Ins. Co. of N. A., 50 N. Y., 45.

DIGEST OF RECENT CASES.

WATCHMAN—CONSTRUCTION AS TO.

1. The policy provided: "Permission is given for said distillery to be closed, a watchman to be on the premises." *Held*, that a watchman within the inclosure occupied by the distillery buildings, was a substantial compliance. The application, which was made part of the policy, provided that the watchman should keep a record. Where it was shown that the clause was introduced by the agent, and the insured signed without knowing the contents, on the agent's representation that it was all right; also that the agent knew that there was no watch clock on the premises; without which no record could be kept; *Held*, that the company cannot be permitted to shield itself from loss on a pretext so trivial.

Com. Ins. Co. vs. Spankneble, 52 Ill., 53.

Andes Ins. Co. vs. Shipman, Ill. S. C., 77 Ill., 189; 5 *Ins. Law Jour.*, 137.

2. In response to the question, "Is there a watchman in the mill during the night? Is the mill ever left alone?" the insured answered, "No regular watchman, but one or two hands sleep in the mill." The application stipulated that it should be a warranty, and the basis of the policy. The policy stipulated that the application was a warranty and a part of the contract, and that any "false representation by the assured, of the condition, situation and occupancy of the property, or any omission to make known every fact material to the risk, or any overvaluation or any misrepresentation whatever, either in a written application or otherwise," should render the policy void. The answer was true when the application was made, but owing to the non-payment of premium, the policy was not delivered until more than

three weeks afterward. Three days before its delivery, the hands ceased to sleep in the mill, which remained vacant at night until its destruction a few weeks later. *Held*, that the application was a promissory and continuing warranty, and the policy was avoided by its breach.

Glendale Woolen Co. vs. Protection Ins. Co., 21 Conn., 19; Houghton vs. Ins. Co., 8 Met., 114; Worcester vs. Ins. Co., 9 Gray, 27; Clark vs. Ins. Co., 8 How. (U. S.), 235; Ripley vs. Ins. Co., 30 N. Y., 136; First Nat. Bank vs. Ins. Co., 50 N. Y., 45; May vs. Buckeye Ins. Co., 25 Wis., 291.

Held, that even if not continuing, the contract must be regarded as made at the time of delivering the policy, and the statement not being then true, the policy was void. *Held*, that were the application simply a representation, the question was material to the risk, and the misrepresentation avoided the policy.

Trial vs. Baring, 10 Law Times R., 215; British Ex. Assurance Co. vs. G. W. Ry. Co., 20 id., 422.

The application also contained the following: "What kind of oil is used? Whale oil. Will you agree that none shall be used which are mixed with or composed of petroleum or any kind of earth or coal oils? Yes." *Held*, that the introduction of an express stipulation in regard to the future use of oil did not imply that this question or that relating to a watchman were intended to refer merely to existing facts, in the absence of such stipulation. *Held*, that it was not material whether the insured saw the policy before its delivery or not. If it did not correctly state the contract, he had his remedy after delivery; moreover he had knowledge of the application which contained the stipulation.

Dissenting opinion holding that the answer was not a continuing warranty, and that the company is liable, cites—

Laine vs. Hyde, 39 Wis., 345; Lyman vs. Babcock, 40 Wis., 503, Frances' Case, 8 Rep., 89 b.; Rungun vs. Fogasse, 1 Plowd., 1; Jackson vs. Silvernail, 15 Johns., 278; Hadley vs. Hadley, 4 Gray, 140; Morse vs. Ins. Co., 30 Wis., 534; Osgood vs. Abbott, 58 Maine, 84; Hooper vs. Cummings, 45 Maine, 359; Moorefield vs. Allbright, 4 Cush., 178; Clinton vs. Ins. Co., 45 N. Y., 454-464; Hoffman vs. Ins. Co., 32 N. Y., 414; Livingston vs. Sickles, 7 Hill, 255; Catlin vs. Springfield Ins. Co., 1 Sum., 434; Breasted vs. Farmers' Loan and Trust Co., 4 Seld., 305; Yeaton vs. Fry, 5 Cranch., 341; 1 Burrows, 349; National Bank vs. Ins. Co., 5 Otto (U. S.), 678; Smith vs. Ins. Co., 32 N. Y., 399; Catlin vs. Ins. Co., 1 Sum., 442; Powers vs. Ins. Co., 8 Phila., 566; Brown vs. Aetna Ins. Co., 40 Conn., 586; Benham vs. United Guaranty and Life Assurance Co.,

7 Exch., 744; Parker and another vs. Ins. Co., 10 Gray, 302; Life Ins. Co. vs. Schultz, 73 Ill., 586; Gilliat vs. Ins. Co., 8 R. I., 252; Gates vs. Ins. Co., 5 N. Y., 469; 2 Hall (N. Y.), 602; 14 Barb., 545; Ins. Co. vs. Lewis, 18 Ill., 553; Life Ins. Co. vs. Fennell, 49 Ill., 180; May vs. Ins. Co., 25 Wis., 291; Stout vs. Ins. Co., 12 Iowa, 371; Ins. Co. vs. Kimberly, 34 Md., 224; Williams vs. Ins. Co., 31 Me., 219; Ins. Co. vs. Schell, 29 Penn. St., 31; Frisbie vs. Ins. Co., 27 Penn. St., 325; Palmer vs. St. Paul Fire and Marine Ins. Co., Wis. S. C.; Erdman vs. Mutual Ins. Co. of the order of Hermann's Sons, Wis. S. C.; Schunk vs. Geigenseitiger Wittwen und Waisen Fund, Wis. S. C.; Ins. Co. vs. Eddy, 49 Ill., 106; Ins. Co. vs. Robinson, 54 Ill., 268.

Blumer & Bliss vs. Phenix Ins. Co., Wis. S. C., 45 Wis., 622; 7 Ins. Law Jour., 833.

3. The application contained the following question and answer: "Is there a watchman in the mill during the night? Is the mill ever left alone?" Answer: "No regular watchman, but one or two hands sleep in the mill." *Held*, that the purport of the whole question was whether any person was kept in the mill in charge of it and to watch it during the night. *Held*, that the answer was directly responsive to the whole question and constituted a continuing warranty that one or two men slept in the mill, and that it was never alone, whose breach avoided the policy as a matter of law, and the question of materiality is not open to be tried by jury.

Knowledge of all the essential facts in regard to the risk at the time of taking the application is not a waiver of the stipulation, which was violated subsequently and at the time the policy was actually issued.

Distinguishing cases of Miner vs. Phoenix Ins. Co., 27 Wis., 393; Webster vs. Phoenix Ins. Co., 36 Wis., 67; Gans vs. St. Paul F. & M. Ins. Co., 43 Wis., 108; North Western Ins. Co. vs. Germania Ins. Co., 40 Wis., 446.

Blumer et al. vs. Phoenix Ins. Co., Wis. S. C., 48 Wis., 535; 9 Ins. Law Jour., 444.

4. In an application for insurance upon a saw mill, which application was made a part of the policy and a warranty, this question was asked: "Is it in charge of some faithful person, residing on the premises, when idle?" and answered: "There is a man on premises." *Held*, to be a continuing warranty, and that there could be no recovery for loss by fire which

happened when the mill was idle and the premises unoccupied.

Miller et al. vs. Germania Ins. Co., Tioga Co. (Pa.) C. P., 6 Ins. Law Jour., 873.

5. The plaintiff, who resided at a distance from a mill on which he held a mechanic's lien, applied to the agent of the defendants to effect an insurance thereon. One of the questions put to the applicant was, "Is a watch kept on the premises during the night? Is any other duty required of the watchman than watching for the safety of the premises? Is the building left alone at any time after the watchman goes off duty in the morning till he returns to his charge at night?" His answer was, "The building is never left alone, there being always a watchman left in the building when not running." At the foot of the application was a condition that the foregoing was a full and true exposition of all the facts and circumstances in regard to the condition, situation and value of the property, so far as was known to the applicant, and material to the risk. The policy which issued thereon mentioned the application in these terms, "Special reference being made to the assured's application, which is his warranty and a part hereof." One of the conditions of the policy provided that any changes material to the risk, and within the control or knowledge of the insured, should avoid the policy unless notified to the company. When the application was made, a watchman was kept on the premises, but after the issue of the policy, and without the knowledge of the assured, he was discontinued. *Held*, that the answer was not a warranty that a watchman would be kept during the existence of the policy, but merely a representation as to an existing state of things at the date of the application. *Held*, also, that even if the withdrawal of the watchman was a change material to the risk, the assured was not responsible, as it was not within his control or knowledge.

Worswick vs. Canada F. and M. Ins. Co., Ont. C. A., 9 Ins. Law Jour., 299.

See Cross Index for other cases bearing on WATCHMAN.

SUPPLEMENT.

AGENT.

1. Knowledge of the agent at the time of contracting, concerning the interest of the insured, is equally available as a waiver, whether acquired at the time of contracting, or previously.

Broadhead vs. Lycoming F. Ins. Co., N. Y. S. C., 1881.

2. The insurance agent, on application of insured, placed the risk in companies which were not represented by him, but by other agents, who had no communication with insured. *Held*, that under the Wis. Statute, the agent was agent of the company and not of insured, and knowledge of vacancy by him was a waiver.

Alkin vs. New Hampshire Ins. Co., Wis. S. C., 1881.

3. Knowledge of the agent, however acquired, will bind the insurer, in case of a renewal, and such renewal with knowledge of incumbrance, is a waiver of the incumbrance. An agent empowered to contract, can waive a policy condition that it shall not be renewed except by special contract written thereon, or by the issue of a new policy; and the issue of a renewal receipt by the agent with reception of premium, estops the company from setting up the condition. A policy provision against "the issuing or levy of an execution, without actual possession, against any kind of property," does not refer to real estate.

Shafer et al. vs. Phoenix Ins. Co., Wis. S. C., 1881.

4. In a suit to recover money claimed to have been collected by the agent, and not paid over; *Held*, that a surety is entitled to stand on the strict terms of his contract. It is not sufficient to say he may not be injured by the change, or may even be benefited. He can answer, it is not nominated in the bond. In an action excluding the bond, and simply for money had and received, the ground of the action is that the defendant has received money

for the use of the plaintiff which he is not entitled to retain. A *prima facie* case is made out by showing the receipt of the money by the defendant, and if there be payments or anything else to be shown in discharge, the burden of proof is on the defendant. The same principles apply as in any ordinary action on an account. If there be credits admitted by the plaintiff, no necessity rests on the defendant for proof as to these credits. It is otherwise, however, if he claim additional credits.

Clay F. & M. Ins. Co. vs. Gray et al., Hamilton Co. (Ohio) D. C., 1879.

5. The declarations of an agent are inadmissible to bind the principal unless they constitute the agreement which he is authorized to make, or relate to and accompany an act done in the course of the agency. In actions to reform an instrument the evidence must be irrefragable; and relief is not to be given when the evidence is loose, equivocal, or unsatisfactory.

Casey vs. Manhattan F. Ins. Co., N. Y. S. C., 1880.

ALIENATION.

6. A policy of insurance contained a condition that it should be void "if the property be sold or transferred, or any change take place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance." It was indorsed "Loss, if any, payable to L. Thompson, mortgagee." The mortgagee foreclosed the mortgage and bought the property in at sheriff's sale on November 3, 1873, and on November 15, 1873, the sheriff executed a deed to him therefor; on December 7, 1873, the property was destroyed by fire. *Held*, that the policy was avoided by the sale.

Hagaman vs. Allemania F. Ins. Co., Pa. S. C., 10 Ins. Law Jour., 838.

APPLICATION.

7. A general insurance agent, with authority to solicit and receive applications for insurance, has no power to accept such applications and bind his principal by stating to the applicant that the risk attached at a certain moment. To convert a propo-

sition by one party to another into a contract, it is not sufficient to show strong probability that it was or would have been accepted, under certain circumstances ; acceptance, actual, final and irrevocable, must be proved.

Franklin Fire Ins. Co. vs. Colt, 20 Wall., 371 ; Evans vs. Home Ins. Co., 4 Otto, 621 ; Baptist Church vs. Brooklyn Co., 28 N. Y., 153 ; McDonough vs. Winchester, 1 La., 90.

Stockton vs. Firemen's Ins. Co., La. S. C., 10 Ins. Law Jour., 854.

8. Where a policy of insurance provides that the application is made a part of it, the two constitute the contract, and the policy cannot be given in evidence without the application, although the latter may be in the possession of the other side. It is the plaintiff's duty to call for its production.

Lycoming Ins. Co. vs. Sailer, 17 P. F. S., 108 ; Lycoming Ins. Co. vs. Storrs, Pa. S. C.

The assured may show by parol that he made truthful statements to the agent of an insurance company, and is not concluded by any misstatements in the application, put there intentionally or negligently by the agent.

Smith vs. Farmers and Mechanics' Ins. Co., 8 Nor., 287 ; Eilenberger vs. Protection Mut. F. Ins. Co., 8 Nor., 464 ; American Cent. Ins. Co. vs. McLanathan, 11 Kan., 538 ; Franklin vs. Atlantic Fire Ins. Co., 42 Mo., 457 ; Rowley vs. Empire Ins. Co., 36 N. Y., 550.

Farmers & Mech. F. Ins. Co. vs. Meckes, Pa. S. C., 10 Ins. Law Jour., 707.

ARSON.

9. A company is liable for loss due to arson by wife of insured, in which the insured had no privity, and cannot set up a counter action in the nature of subrogation against the insured and wife, for damages done by the latter to the property.

Midland Counties Ins. Co. vs. Smith et al., Eng. Q. B., 1881.

CANCELLATION.

10. When an insurance company, after due notice, effect a cancellation of the policy, in order to extinguish the liability of the company for the insurance, actual payment of the sum to be refunded must be made. When a due bill or certificate of in-

debtedness is given for the return premium, it is properly left to the jury to decide whether such instrument is accepted as payment or only as an evidence of indebtedness.

Hathorn vs. Germania Ins. Co., 55 Barb., 28; *Van Valkenberg vs. Lenox Fire Ins. Co.*, 51 N. Y., 465; *Ætna Ins. Co. vs. Maguire*, 51 Illinois, 242; *Holden vs. Putnam Fire Ins. Co.*, 46 N. Y., 1.

Home Ins. Co. vs. Tighe, Pa. S. C., 10 *Ins. Law Jour.*, 779.

11. The burden of proving cancellation is upon the party claiming it, and the right can only be exercised in strict compliance with the terms of the contract.

Runkle vs. Citizens' Ins. Co., U. S. C. C. Ohio, *Reporter*, Vol. 11, p. 599.

CARRIER.

12. The bill of lading of the goods of the plaintiff contained a condition that the P. R. R. Co., the carrier and defendant, should not be liable for "loss or damage on any article or property whatever by fire or other casualty while in transit, or while in depots or places of transshipment," and the cars containing the goods were stopped at or near the defendant's depot at Pittsburgh by a general strike of the defendant's employees and burned by a mob. *Held*, the defendant not being shown to have been guilty of any negligence by which the efficiency of the exception or condition was impaired, the plaintiff was not entitled to recover.

Hall vs. Pa. R. R. Co., U. S. C. C., Pa.

13. Case of *St. Louis Ins. Co. vs. St. Louis etc. R. R. Co.*, page 147 *ante*, as to liability of carrier, was affirmed in U. S. S. C., 1881.

DESCRIPTION.

14. Where the figures and word 76 feet, were marked on a diagram referred to, but whether the distance was so given by the assured as was claimed by the agent who wrote them, was disputed, the question was properly for the jury whether there had been a misrepresentation which would vitiate the policy.

Farmers & Mechanics' F. Ins. Co. vs. Meckes, 10 *Ins. L. J.*, 707.

Pottsville Mut. F. Ins. Co. vs. Meckes, Pa. S. C., 10 *Ins. Law Jour.*, 717.

EXPLOSION.

15. The explosion of the boiler of a steamer is a peril insured against by a marine policy in the ordinary form. A steamer insured by a time policy became a wreck, by reason of the explosion of her boiler in ordinary weather under ordinary pressure of steam. The *causa sine qua non* of the explosion was that the boiler had become, from external and internal corrosion by bilge water and "scale," too thin to resist the steam. The corrosion might have been discovered, and in some measure prevented by ordinary care. *Held*, that though unseaworthiness was a *causa sine qua non* of the loss, the explosion was a proximate cause, and a peril insured against.

West India and Panama Telegraph Co. vs. Home and Colonial Marine Ins. Co., Eng. C. A., 1881.

GARNISHMENT.

16. Where the company garnished declared its inability to determine the rightful claimant, and offered to pay the money into court, it was entitled to deduct its costs out of the fund.

Baker vs. Lancashire Ins. Co., Wis. S. C., 8 N. W. Rep., 597.

GENERAL AVERAGE.

17. The policy was effected with English underwriters, by an English merchant, upon goods shipped in a French ship, and provided that general average was to be payable, as per judicial foreign statement. The ship was damaged by a collision and put into port for repairs, the cargo, however, being uninjured. The master, not having funds to do the necessary repairs, gave a bottomry bond on ship, freight, and cargo. The ship and freight proving insufficient to satisfy the bond, the assured had to pay the deficiency, in order to obtain possession of his goods. *Held*, that the policy was not to be construed according to French law, except so far as the parties had expressly stipulated that it should be, and that there being no loss by perils of the sea, according to English law, the assured could

not recover from the underwriters the amount which he had paid.

Greer vs. Poole, Eng. Q. B. L. R., 5 Q. B. Div.

18. Where custom has sanctioned the partial loading of gas-pipe on deck in order to secure a full cargo, a jettison of the deck load will call for general average contribution from that stowed below.

Wood vs. Phœnix Ins. Co., U. S. C. C. Pa., 10 Ins. Law Jour., 735.

INCUMBRANCE.

19. An illegal assessment and seizure of a distillery by an internal revenue collector, is not a lien within the policy.

Runkle vs. Citizens' Ins. Co., U. S. C. C. Ohio, Reporter, Vol. 11, p. 599.

INSOLVENCY.

20. The stockholder of an insolvent company cannot be bound by the directors and officers, by any act as a corporate body, which modifies the contract at the time of subscription, and to which he never assented, except by retaining the stock under the original subscription. His liability in such case is not increased by a reorganization under the general insurance law.

Shufeldt vs. Carver, Cook Co. (Ill.) C. C.

INSURABLE INTEREST.

21. A vendee in possession under a parol contract for the sale of realty, has an insurable interest therein.

Ætna Ins. Co. vs. Tyler, 16 Wend., 385; Traders' Ins. Co. vs. Robert, 9 Wend., 406; McGivney vs. Phœnix Ins. Co., 1 Wend., 85; Locke vs. N. A. Ins. Co., 13 Mass., 67; Col. Ins. Co. vs. Lawrence, 2 Pet., 25; Redfield vs. Holland Purchase Ins. Co., 56 N. Y. R., 354; Columbia Ins. Co. vs. Cooper, 14 Wr., 348; Harris vs. York Mut. Ins. Co., 14 Wr., 548; Coursin vs. Pa. Ins. Co., 10 Wr., 323.

Farmers & Mech. F. Ins. Co. vs Meckes, Pa. S. C., 10 Ins. Law Jour., 707.

LOSS.

22. A shipowner claimed against the insurance company, of which he was a member, upon a policy of insurance incorporating the by-laws of the company. A constructive total loss of the ship was admitted, but the defendants disputed the claim on the strength of a by-law which provided that, in the event of any ship being stranded or damaged and not taken into a place of safety, it should be lawful for the directors of the company to use every possible means in their power to procure the safety of the said ship, the owner bearing his proportion of the expense incurred; and that no acts of the company or its agents under or in pursuance of the power thereby reserved to the company, shall be deemed or taken to be an acceptance of recognition of any abandonment of which the assured may have given notice to such company; and that the company, under any circumstances, should only pay for the absolute damages caused by the perils insured against, which in no case was to exceed the sum insured; *Held*, that this by-law was no answer to the action.

Foxwood vs. North Wales Mut. Mar. Ins. Co., Eng. Q. B., 41 L. T. R. N. S., 802.

MASTER.

23. The master can only sell the cargo when the goods could not have been sent to their destination in a merchantable condition without an expense in excess of their value, and such sale may be set aside in an action by the underwriters against the purchasers. The master must exhaust every available means to procure funds to make the cargo available without immediate sale. The perishable and non-perishable portions should be separately treated, and not generally sold as an entirety.

Atlantic Mutual Ins. Co. vs. Huth, Eng. C. A., 1880.

MEASURE OF DAMAGES.

24. The plaintiffs were the owners of a ship which they insured for twelve months from the date of her sailing from L., the ship being valued at £3,700. During the continuance of the risk and

while she was passing up the river to M. she grounded and remained aground four days, when she was got off and towed up to the port of M. Having obtained the best advice they could, the plaintiffs sold her unrepaid for £3,897. *Held*, that the correct mode of ascertaining the proportion of loss to be made good by the underwriter, is to compare the value of the sound ship at the port of distress with her value there when damaged, and to apply this proportion to her agreed value.

Pitman vs. The Universal Marine Ins. Co., Eng. Q. B., London Law Times, July, 1881.

25. A contract of insurance against fire is a contract for indemnity only, and if a proper defense is made the assured can never recover more than the value of the thing insured; but, in this case, although the value of the property was not equal to the aggregate amount of the incumbrances and the policies, that issue not having been made by the pleadings, the court could not decide the case upon issues which the evidence shows could have been successfully made, but which the parties omitted to make.

Home Ins. Co. vs. Gaddis, Ky. C. A., 10 Ins. Law Jour., 774.

MORTGAGOR AND MORTGAGEE.

26. Premiums of insurance paid by mortgagees in possession, upon an insurance by them for the benefit of all concerned, are properly chargeable against the proceeds of sale of the mortgaged premises deposited in court after a foreclosure sale.

Burgess vs. Savings Bank, U. S. C. C. Mass.

27. The policy insured D., the owner, loss payable to his mortgagee. The policy was procured by the mortgagee and charged against the mortgagor upon the failure of the latter to insure, without any notification or request to the mortgagor to fulfill his agreement, and without his knowledge until after the loss. *Held*, that this was not an insurance of the mortgagor's interest, and therefore not other insurance procured by him. The mortgagor was not in default in the absence of notice from the mortgagee, and the insurance was that of the latter.

Titus vs. Glens Falls Ins. Co., 81 N. Y., 210.

Another condition stipulated that in case of other insurance on the property, it should be liable only for a proportionate amount. *Held*, that a policy procured by the mortgagor on his interest was other insurance within the policy.

Doran vs. Franklin F. Ins. Co., N. Y. C. A., 10 Ins. Law Jour., 882.

28. A mortgagee has no interest in a policy taken out by the mortgagor for his own benefit, and cannot be subrogated to the rights of the mortgagor against the company, though on foreclosure the security proves insufficient.

Ryan vs. Adamson, Iowa S. C., 1881.

29. The insurance was effected by the owner, loss payable to mortgagee. Afterwards insured sold the property with verbal consent of agent. The policy provided that it should be void in case of assignment without written consent. *Held*, that the local agent, whose authority was not restricted by any words in his appointment by the general agent, had authority to waive the required indorsement by verbal consent. *Held*, that a mortgagee of the property to whom the policy is assigned, can recover in case of loss only the amount which the insured would be entitled to receive in case no assignment had been made ; the right of the mortgagee to recover may be defeated by any act of the insured which avoids the policy ; an action by the assignee is subject to all defenses which may be made against the assignor ; and in the present case, the right of the assured to recover anything in case of loss terminated with the transfer by him of all interest in the property, and the plaintiff mortgagee is in no better position, since defendant had not consented to the transfer.

Carpenter vs. Providence, etc., Ins. Co., 16 Peters, 501 ; Grosvenor vs. Buffalo Ins. Co., 17 N. Y., 391 ; 38 Cal., 541 ; 120 Mass., 90 ; Humphrey vs. Ins. Co., U. S. Circuit Ct., N. Y. (1880).

Volk vs. St. Paul F. & M. Ins. Co., U. S. C. C. Cal., 1880.

MUTUAL COMPANIES.

30. The policy had been assigned to plaintiff when she purchased the property, and which contained a clause that if the property was sold, or the policy assigned without the consent of

the company in writing thereon, the policy should be null and void. The consent was not obtained. *Held*, that if the plaintiff had obtained the consent of the company in writing after the conveyance and assignment to her, it would have operated as waiver of the forfeiture incurred by the transfer of title. The officers of a mutual insurance company have no authority to waive those provisions of the by-laws which constitute the essence of the contract. The case is different from stock companies, which may contract as they please within general limits.

14 Gray, 203; 4 Allen, 116; 3 Den., 254; 11 Barb., 624; 19 N. Y., 305; 68 ib., 434; 14 ib., 253; 20 Barb., 468; 25 ib., 189; 29 ib., 31.

Gibbs vs. Richmond Co. Mut. Ins. Co., N. Y. C. P.

NOTICE.

31. A waiver of notice and proof of loss, within the time specified by the policy, may be inferred from a denial of their obligation, by the insurers, exclusively on other grounds than the omission to give such notice.

Inland Ins. Co. vs. Stauffer, 9 Cas., 397; *State Ins. Co. of Missouri vs. Todd*, 2 Nor., 272; *Farmers' Mut. Life Ins. Co. of Schuylkill Co. vs. Moyer*, 38 Legal Intell., 232.

Farmers & Mech. F. Ins. Co. vs. Meckes, Pa. S. C., 10 *Ins. Law Jour.*, 722.

OTHER INSURANCE.

32. A mere soliciting agent employed by the authorized agent, has no authority to consent to other insurance, and notice to him is not notice to the company.

Heath vs. Springfield F. Ins. Co., N. H. S. C., 58 *N. H.*

33. The policy on "catchings" of a whaling vessel, only attached for such amount as prior policies should not cover. Prior policies insured on outfits "outward," and catchings "homeward." *Held*, that there was other insurance on catchings as soon as they were taken on board, though the vessel was not homeward bound.

Lewis vs. Manufacturers' Ins. Co., Mass. S. J. C., 1881.

34. Where the policy provided that it should be void in case of other insurance by the insured, but loss was made payable to

mortgagee; *Held*, that other insurance by the insured, would not invalidate the claims of mortgagee.

Black vs. National Ins. Co., Montreal Q. B., 3 Montreal Legal News, 25.

PAROL CONTRACT.

35. Although parties may agree that a contract which they have reduced to writing shall not be altered unless the agreement for such alteration be evidenced by writing, yet a subsequent parol agreement to alter will be as valid as if no such stipulation had been in the original written contract.

Home Ins. Co. vs. Gaddis, Ky. C. A., 10 Ins. Law Jour., 774.

36. M., the agent of several companies, was accustomed to procure policies for the plaintiff and hand them to him when opportunity offered, plaintiff leaving the choice of the company to M. When the policy on the property in question was nearly expired, a conversation took place between them regarding the renewal of the insurance, in which plaintiff urged M. to keep him insured in good companies, and told him he relied on him to do so on the best terms he could secure, and was afterward told by M. that he had put a policy on it, but made no further inquiries about it or the terms. The loss occurred after the expiration of this policy. *Held*, that there was no contract with the company for its renewal, there was no specific agreement with M. regarding any particular company or the terms of any contract; he dealt with M. simply as his own agent, and not as the agent of any company.

Sargent vs. Nat. F. Ins. Co., N. Y. C. A., 10 Ins. Law Jour., 852.

PARTICULAR AVERAGE.

37. The policy was on "advances on vessel and cargo, free of general and particular average, and without reclamation." *Held*, that the language is to be interpreted in the sense in which the promisor had reason to suppose it was understood by the promisee; the construction most beneficial to the promisee should be adopted. *Held*, that there was a distinct insurance upon the ad-

vances on the vessel and the cargo, severally. *Held*, that in insurance free of particular average, if the expenses of repair will exceed half the value of the ship when repaired, there is a constructive total loss, and she may be abandoned. An averment that the ship was found to be irreparable and was condemned and sold is an averment of a total loss.

Wright vs. Williams, N. Y. S. C.

PLEADING.

38. Where it was set forth in the complaint that the insurance was on the property of appellee specified as "his house," etc. *Held*, that this was sufficient averment of interest at the commencement of the risk.

Rising Sun Ins. Co. vs. Slaughter, 20 Ind., 520.

But the complaint should allege that the assured had an insurable interest at the time of the loss.

Aurora Fire Ins. Co. vs. Johnson, 46 Ind., 315.

It must be proved that the assured had an interest at the time of the loss.

Lynch vs. Dalzell, 3 Bro. P. C., 497.

A defective averment may sometimes be cured by verdict, but not where the objection has been taken by demurrer, and there is no statement at all, unless the omitted matter be fairly inferable from the facts alleged and proved.

Home Ins. Co. vs. Duke, Ind. S. C., 10 Ins. Law Jour., 857.

POLICY.

39. The policy for one year was renewed for the same term upon payment of the same premium. *Held*, that an agreement for a second renewal with receipt of the same premium, was also for one year, and the company was estopped from alleging the non-receipt of the premium from the agent.

Scott vs. Home Ins. Co., Wis. S. C., 1881.

40. A policy which provides that any usual mode of loading may be pursued, will cover deck loads where usual, and an addi-

tional clause that the consent of the company must be had to goods loaded on deck, will be restricted to such goods as are not usually carried there. The acts of clerks in the office of the agent performing the duties of the agency, are those of the agent.

Allen vs. St. Louis Ins. Co., St. Louis (Mo.) C. A., 1881.

41. Where a policy is issued to two joint owners or partners, and one subsequently parts with his interest to the other, and a renewal is executed in which the name of the first is erased, and the jury find this was done before the delivery, an action on the original policy is sustainable by the second. In the absence of special agreement in the policy to perform the conditions, such performance need not be alleged in the declaration. In case of mortgage, the presumption is that it was not paid, in the absence of evidence to the contrary. Where the charter of a mutual company provided that no insurance should be valid unless the title be perfect and unincumbered, or the true title be disclosed, it is enough if the title may legally resist all claims; a mortgage barred by the statute of limitations need not be disclosed; nor need a tenancy under lease be disclosed. Where the property was described as, to be occupied by tenants, a brief vacancy during change of tenants need not be disclosed under a requirement of notice in case of any increase of risk whether within the control of insured or not. Whether such vacancy increased the risk, was a question for the jury. A sale by one insured partner or co-tenant to another is not an alienation. A substantial compliance with the requirement concerning a magistrate's certificate, is sufficient. Immediate notice means within a reasonable time under the circumstances and is a question of fact for the jury. A renewal certificate need not be under seal, although the original policy in a mutual company was so.

Lockwood vs. Middlesex Mutual Ins. Co., Ct. S. C., 10 Ins. Law Jour.

42. Where, by the terms of an open or running policy of marine insurance, the insurance to be effected is limited to "goods or merchandise," "laden or to be laden" on shipboard, the same

to be approved by the insurer, and to be indorsed on the policy. such policy will not cover anything not so laden on shipboard, nor will it attach to any property not fairly embraced within the description of "goods and merchandise." Such a running policy is at most a promise or contract to effect future insurance, only upon shipments made in accordance therewith, and upon compliance with all the terms and conditions thereof; and such policy gives no right to the holder to apply for insurance thereunder of things different from those contemplated by and described in the instrument. An application for the indorsement on such a policy of insurance on "one new sloop in tow of" a vessel, creates no obligation on the part of the insurer to accept it; and when the indorsement is not, in fact, made as demanded, there is no contract of insurance under the policy. A sloop in tow is not "goods and merchandise," as contemplated by such a policy. Nor is it "laden on shipboard," as the term is used in such a policy.

Oteri & Bro. vs. Home Mutual Ins. Co., New Orleans (La.) (C. A., 1 McGloin's Rep., 198.

PREMIUM NOTE.

43. If a member of a mutual insurance company is in default in the payment of an assessment on his policy, after due notice according to the by-laws and rules of the company, the protecting power of the policy is suspended until the assessment is paid. No recovery can be had for a loss sustained during the continuance of such default.

Hummel et al.'s Appeal, 23 P. F. Smith, 320; Columbia Ins. Co. vs. Bulkley, 2 Norris, 293; Washington Mutual Fire Ins. Co. vs. Rosenberger, 2 id., 373; Crawford County Mutual Ins. Co. vs. Cochran, 7 id., 230.

In levying an assessment upon the premium notes of members of a mutual insurance company, it is not necessary for the directors to make a separate assessment on each member by name; nor is it necessary to levy an ascertained sum upon each member; a general assessment upon all the members for a given percentage upon their premium notes is sufficient.

Lycoming F. Ins. Co. vs. Rought, Pa. S. C., 10 Ins. Law Jour., 786.

PROOFS OF LOSS.

44. The statement of the property destroyed must be sworn to by the owner, if so required by the by-laws of the company. When a married woman is the owner of the property insured, it is not sufficient that the statement is sworn to by her husband. The insurance company did not waive the defects in the statement by proceeding to a determination of the plaintiffs' claim, it not appearing on what ground the claim was rejected.

Spooner vs. Vermont Mut. F. Ins. Co., Vt. S. C., 53 Vt.; 10 Ins. Law Jour., 737.

45. The insurance company having, in this case, by its cross petition given notice that it would not pay in any event, violated its contract, and the assured had a right to sue without furnishing the preliminary proofs required by the policy, and without showing that its production had been otherwise waived.

Home Ins. Co. vs. Gaddis, Pa. S. C., 10 Ins. Law Jour., 774.

46. A policy of insurance against fire, upon a house and personal property therein, contained a provision that persons sustaining loss or damage by fire, should forthwith give notice of said loss in writing to the company, and as soon thereafter as possible render a particular statement of such loss, signed and sworn to by them. The property insured being destroyed by fire, the agents of the company notified the home office, as was their custom, of the loss. Shortly afterwards, a special agent of the company visited the ruins, and, under another provision of the policy, procured from the insured a statement under oath, of the origin of the fire, and the loss. A month later, the insured was criminally prosecuted by the agent of the company on the charge of having himself set fire to his house, but was acquitted. In October, three months after the fire, he forwarded to the company a proof of loss, which was returned to him as informal, with the regular blanks to be used. These he filled out and returned to the company. Their receipt was acknowledged by the general adjuster. The money not being paid, this suit was brought. *Held* (affirming the judgment of the court below), that the notice

of the destruction of the premises by the agent, so far as the house was concerned, was a sufficient compliance with the terms of the policy. As to personal property, the question whether the proofs of loss were furnished by the company in accordance with the terms of the policy was rightly submitted to the determination of the jury. *Held*, also, that from the conduct of the company, the jury might have inferred an entire waiver of these proofs; the court might have found that there was an unqualified acceptance of the proof of loss, and hence a waiver of the condition, and need not have left the question to the jury. The statement made under oath by the insured was equivalent to the statement of loss required by the policy. Under all the circumstances of the case, the company cannot complain of the delay as unreasonable.

Lycoming Mutual Insurance Co. vs. Schollenberger, 8 Wr., 259; *Farmers' Mutual Ins. Co. of Schuylkill Co. vs. Moyer*, 10 Weekly Notes, 120.

Home Ins. Co. vs. Davis, Pa. S. C., 10 *Ins. Law Jour.*, 754.

47. To charge the jury in the absence of evidence that a rejection of the statement of loss on any other ground, was a waiver of its defects, was error.

Spooner vs. Vt. Mut. F. Ins. Co., Vt. S. C., 53 Vt.

48. Where the policy provided that proofs should be presented forthwith, and claims should be barred unless presented within one year from date of loss; and it was alleged that on account of the Chicago fire, all knowledge of the existence of the policy was lost, until some seven years after; *Held*, that forthwith meant reasonable diligence under the circumstances, and was for the jury. As a matter of law, suit was not barred by the delay of seven years in furnishing proofs, and the limitation began from the time of presenting proofs.

Kirk vs. Ohio Valley Ins. Co., Hamilton Co. (Ohio) D. C., *Chicago Leg. News*, 1881.

49. Proofs of loss, though sworn to, may be corrected on the trial by evidence of insured as to the origin of the fire, in case of an honest mistake, although the proofs assigned the origin to an explosion, which was among the excepted risks.

Waldeck vs. Springfield, &c., Ins. Co., Wis. S. C., 1881.

REFORMATION.

50. To justify the reformation of a written contract the proofs must be full and clear that the mistake made was mutual, and that it fails to express the intention of both the parties. Where the policies were void on account of alienation, and the mortgagee, to protect his interest, procured an indorsement, which was claimed by one party to be intended as a waiver of the forfeiture, and by the others as a new contract, equity will not reform, but will leave the contract to be construed by a court of law under the facts as alleged.

Stockbridge Iron Co. vs. Hudson Iron Co., 107 Mass., 290 ; *Sawyer vs. Hovey*, 3 Allen, 331 ; *Conedy vs. Marcy*, 13 Gray, 373.

German American Ins. Co. vs. Davis, Mass. S. J. C., 10 Ins. Law Jour., 670.

RISK.

51. A policy of insurance against fire was issued on articles of furniture described as "all contained in house No. — McMullen St., Providence, R. I." The insured, without the knowledge of the insurer, removed these articles to a house in another street, where they were consumed. *Held*, that the insured could recover on the policy.

Holbrook vs. St. Paul F. & M. Ins. Co., 25 Minn., 229.

Lyons vs. Prov. Wash. Ins. Co., R. I. S. C., 10 Ins. Law Jour., 733.

52. The policy provided "Carpenter's risk granted during the term of this policy, and it is understood and agreed that this policy is upon the express condition that the property shall not be operated as a distillery, * * it being intended by this policy to cover carpenter's risk only." *Held*, that the intention was simply to exclude the distillery risk, and not that common to all property. The policy was liable for a loss after the termination of the carpenter work.

Alkin vs. New Hampshire Ins. Co., Wis. S. C., 1881.

53. Where it was claimed that the policy was avoided by sinking an artesian well on factory premises, by which a vein of gas

was struck, which fired the premises ; *Held*, that an “increase of risk” must be essential in order to work a forfeiture. Permission in the policy “to make alterations and repairs incidental to the business,” is restricted to such as will not materially increase the risk, where the policy also stipulates that it shall be void in case of any increase of risk.

Crane vs. City Ins. Co., U. S. C. C. Ohio, 1880.

54. An increase of risk subsequent to the first insurance, not made known to the insurer, will forfeit a renewal, whether known to plaintiff or not, under the terms of the policy.

Brueck vs. Phœnix Ins. Co., N. Y. S. C., Reporter, 1880, p. 746.

SEAWORTHINESS.

55. Where promissory representations were made orally in the application that repairs should be made at a certain port, and it was claimed that an examination there showed that no repairs were needed ; *Held*, that if repairs were unnecessary the promise need not be fulfilled. *Held*, that the burden of proof of unseaworthiness is on the company, but here the burden was on plaintiff to show that compliance with the promise was not necessary.

Lunt vs. Boston Mar. Ins. Co., U. S. C. C. N. Y., Reporter, Vol. 11, p. 598.

STRANDING.

56. Stranding is something which arises from usual causes—causes ordinarily incident to the ordinary course of navigation. A bank was raised in the bottom of the harbor by the paddles of the steamers, on which the vessel grounded. *Held*, that where, by a temporary state of circumstances, however caused, the bottom of a river or harbor is in a particular place in a condition different from its ordinary condition, and thereby the vessel comes to the ground at that place in a different manner from that in which she would ordinarily come to the ground at that place, that is a “stranding” within the common condition in the policy. The bank here was not the ordinary state of the harbor, and so it was a “stranding” for which the underwriters were liable.

Letchford vs. Oldham, Eng. C. A.

SUBROGATION.

57. In case of partial loss, the insurers who have paid in whole or in part, must be joined in a suit brought by the insured against the wrong doer, in Wisconsin, and if they refuse to join must be made defendants. The insurers might sue in their own name or be joined with the insured. Had the wrong doer paid knowing that the insurers had also paid, it would be no defense against a suit by the latter, even though released by the insured.

Pratt vs. Radford, Wis. S. C., 8 N. W. Rep., 592.

TITLE.

58. The policy insured L. on her furniture, loss payable to S. as interest might appear. The policy provided that it should be void if the interest of insured whether as owner, trustee, etc., be not truly stated. Her agent represented to the company that the furniture was hers. She was simply in possession under a contract to purchase from L., with a stipulation that the title should not pass until payment was complete. Only part had been paid. *Held*, that there was a misrepresentation of title which worked a forfeiture.

Mers vs. Franklin Ins. Co., 68 Mo., 127.

Held, that the condition making the loss payable to L. did not cure the defect.

Lasher vs. St. Joseph F. & M. Ins. Co., N. Y. C. A., 10 Ins. Law Jour., 845.

59. The foreclosure of a mortgage by the mortgagee to whom loss was payable, forfeited the policy under a stipulation against any sale, or transfer, or change of ownership without consent. A reference in large type calling special attention to small type provisions, is sufficient to defeat an allegation of fraud in view of the smallness of the type.

Thompson vs. Allemania Ins. Co., Pa. S. C.

60. Sole ownership within the meaning of the policy refers to the extent of the insurable interest, not to the validity of the title. The plaintiff, under claim of right, having exclusive en-

joyment and use of the property, without any adverse claim, under an absolute deed, a showing that the grantors were only entitled to an easement, would not affect the question of his sole ownership.

Miller vs. Alliance Ins. Co., U. S. C. C. N. Y., 1881.

61. A tax lien is not an incumbrance within the policy. An executory contract to lease, with possession by lessee under oral consent, is not a change of possession, nor an incumbrance.

Alkin vs. New Hampshire Ins. Co., Wis. S. C., 1881.

62. A sale and transfer of title under a deed of trust is a change of title within the policy.

Com. Union Ins. Co. vs. Scammon, Ill. S. C., 1881.

VACANT.

63. A policy of fire insurance contained the following condition: "This policy will not cover unoccupied buildings (unless insured as such), and if the premises insured shall be vacated without the consent of this company indorsed hereon, * * * this policy shall cease and determine." *Held*, that the temporary absence of the insured from the premises, leaving them for the time unoccupied, was not a breach of the conditions of the policy.

Franklin F. Ins. Co. vs. Kepler, Pa. S. C., 10 Ins. Law Jour., 784.

64. The words "vacant" and "unoccupied," as applied to a dwelling may have different meanings. While used as the place of deposit of inanimate things it is not vacant, though not used as an abode. On the other hand, while used as a place of abode or shelter, it is occupied though no articles of furniture are present.

Hermann vs. Merch. Ins. Co., N. Y. C. A.

The policy provided that it should be void if the premises became vacant or unoccupied and so remained for more than 30 days without notice and consent. *Held*, that fortnightly visits of the owner and weekly tours of inspection by a neighboring family intrusted with its supervision, were not occupancy of a dwelling within the meaning of the policy. *Held*, that the fact that the

company knew it was simply a summer residence, did not charge it with knowledge of non-occupancy. The contract provided for notice when such non-occupancy should occur. *Held*, that the fact that the insurance was on several detached pieces of property, the whole constituting a rural establishment, did not require that all should be unoccupied in order to avoid it as to the part so unoccupied. The policy is in this respect distributive and its violation as to a part, affects only such part.

Merrill vs. Agricultural Ins. Co., 73 N. Y., 452; *Case of Bryan vs. Peabody Ins. Co.*, 8 West Va. R., 605, distinguished.

The non-occupancy of a dwelling is a non-occupancy of such outbuildings as privy, wash-house, etc., whose use is appurtenant to the dwelling. Where the prohibition is against non-occupancy and vacancy, both are necessary to work a forfeiture, but where it is against non-occupancy or vacancy, a violation of the first will work a forfeiture though there be no vacancy.

Herman vs. Adriatic F. Ins. Co., N. Y. C. A., 10 *Ins. Law Jour.*, 743.

65. Agents of foreign companies in Minnesota who make contracts, have power to waive policy stipulations as to vacancy requiring indorsement, unless notice of limitation is brought home to the insured. Mere knowledge of vacancy by agent where his consent was not given, although he neither canceled the policy nor notified the company, is not sufficient to prove a waiver.

Davy vs. Glens Falls Ins. Co., U. S. C. C. Minn.

VALUATION.

66. An overvaluation of the premises insured, in order to avoid the policy, must be intentional or fraudulent.

Farmers & Mech. F. Ins. Co. vs. Meckes, Pa. S. C., 10 *Ins. Law Jour.*, 722.

67. The policy provided that it should be void in case of overvaluation. The valuation in the application was in response to a requirement of the facts, "so far as the same are known to the applicant." *Held*, that an overvaluation would not work a forfeiture unless knowingly made.

Miller vs. Alliance Ins. Co., U. S. C. C. N. Y., 1881.

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